

# Manual of the Law of Armed Conflict

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# Foreword

*War is always devastating, but sometimes unavoidable. Occasionally, armed force is needed to secure peace.*

*The Norwegian Armed Forces are made up of women and men with one thing in common: they all work for a higher purpose – safeguarding the security of others and preserving peace in Norway. The Armed Forces are the nation's ultimate instrument of power. At the heart of the military profession is the exercise of military force as the supreme expression of security policy. With this role comes a vital responsibility to act within the boundaries established for military use of force. Our soldiers must perform demanding operational assignments at times of peace, crisis and war. They have to reckon with the law of armed conflict every day. Sometimes they have only seconds to make a life-or-death decision. Accordingly, the knowledge and attitudes required to act correctly must be deeply instilled. The decision-making of each soldier must derive from knowledge that is second nature. I regard this Manual of the Law of Armed Conflict as an important step in ensuring that our soldiers possess the right knowledge.*

*The experiences of World War II have taught us something important: in war it is vital that the parties comply with certain rules. All parties benefit from the observance of minimum standards in wartime. Nineteen forty-nine was a crucial year in the development of the law of armed conflict, as that is the year the four Geneva Conventions were finalised. Two additional protocols followed in 1977. Together, these conventions constitute the primary documents on the use of force in armed conflict.*

*Certain of these regulations may seem complicated, not least because they were written long ago. The law of armed conflict today is largely a matter of interpreting rules more than 60 years old. One of the main purposes of this manual is to make the regulations accessible to those who have to apply the rules. The explanations focus on what soldiers need to know: who is a lawful target in an armed conflict? Which weapons may I use? And, just as important, who is to enjoy protected status during an armed conflict? Which weapons are prohibited? The manual is a practical guide for use in both teaching and the planning of operations.*

*However, finding one's way through these regulations is not the only challenge. The law of armed conflict presents considerable ethical dilemmas and demands difficult balancing exercises. Simply put, what weighs more – military necessity or the protection of civilians? It is just as important to be familiar with the rules as it is to demonstrate a good attitude and sound morals when applying them.*

*A further complication is that the enemy does not always follow the rules. So, why should we? First and foremost, the answer is that the rules are not based on reciprocity: we are not exempt from following them even if the enemy violates them. However, acting in accordance with the law of armed conflict is also of intrinsic value. Our compliance improves our perceived legitimacy and credibility, and builds trust on the part of the civilian population and the international community. It is precisely when the enemy chooses to employ unlawful means to win the war that it is even more important for us to be a good example.*

*The Norwegian Armed Forces are among the best in the world. We act professionally, and have a strong focus on compliance with the law of armed conflict. This manual is the first of its kind in Norway, and one of few globally. It clearly expresses how seriously we take our obligations under public international law.*

*I hope that this Manual of the Law of Armed Conflict will become a valuable and much-used instrument for all members of the Norwegian Armed Forces.*



Oslo, 19 March 2013  
The Chief of Defence

# Table of contents

Title	Page
Foreword	i
Preface and guidance to users	1
1: Introduction	5
2: Targeting: attack and precautions in attack	31
3: Persons who are lawful targets	49
4: Protection and protected persons	71
5: Medical services and the protection of sick, injured, shipwrecked and dead persons	95
6: Prisoners of war and interned persons	117
7: Objects that are lawful targets, and protected objects	151
8: Means of warfare (weapons)	169
9: Methods of warfare	195
10: Maritime operations	215
11: Air operations	241
12: Control and security measures relating to the civilian population during armed conflict	261
13: Occupation	275
14: Observing and enforcing the law of armed conflict	295
15: Rules of engagement	327

Foreword	i
Preface and guidance to users	1
<b>1: Introduction</b>	5
International law	5
Legal basis for the use of force – jus ad bellum	5
<i>The basic prohibition against the use of force and intervention</i>	6
<i>Exceptions from the prohibition against the use of force against other states</i>	7
UN mandate	7
States' right to self- defence	9
Consent	11
Introduction to the law of armed conflict – jus in bello	12
Terminology	12
War and armed conflict	12
Attack, military operations and hostilities	13
The law of armed conflict	14
<i>Basic principles of the law of armed conflict</i>	14
Distinction	15
Military necessity and humanitarian considerations	15
Proportionality	16
Classification of conflicts and applicable law: international and non-international armed conflicts	18
<i>How and when does the law of armed conflict apply?</i>	18
<i>International armed conflicts</i>	19
<i>Non-international armed conflicts</i>	20
<i>How non-international armed conflicts are dealt with in the manual</i>	21
<i>Legal sources</i>	22
Neutrality	23
Issues relating to legal interoperability in multinational operations	23
Issues relating to peace support operations	24
The relationship between the law of armed conflict and human rights law	25
The relationship between the law of armed conflict and the right of individual self-defence	27
The relationship between the law of armed conflict and rules of engagement (ROE)	29
<b>2: Targeting: attack and precautions in attack</b>	31
Introduction	31
Definition of attack	32
Protection of civilians and civilian objects	32
Doubt about whether something or someone is a lawful target	33
<i>Attacks against persons</i>	34
<i>Attacks against objects</i>	35
Indiscriminate attack	36
<i>Indiscriminate attacks employing otherwise lawful weapons</i>	36
Attacks which are not directed at a specific lawful target	36
Attacks which treat several dispersed targets as a single target	37
Proportionality	37
Precautions in attack	39

<i>Risk of injury or damage to civilians or civilian objects</i>	40
<i>Choice of means and methods</i>	42
<i>Challenges relating to the indirect effects of attack</i>	43
<i>Requirement to cancel or suspend a planned attack</i>	43
<i>Advance warning</i>	43
<i>Pre-planned and dynamic targeting</i>	44
Illustration: Conduct of attack and application of the law of armed conflict	46
Protection of one's own civilian population against the effects of an attack	47

### **3: Persons who are lawful targets**

Introduction	49
Brief overview of persons qualifying as lawful targets	50
<i>Lawful combatants</i>	50
<i>Other combatants</i>	50
Rights to participate in hostilities	51
Members of the armed forces	51
Members of organised resistance movements in international armed conflicts	54
Participants in spontaneous resistance to invasion in an international armed conflict	54
Civilians who participate directly in hostilities	55
<i>Direct participation</i>	57
<i>Hostilities</i>	59
<i>Application of the conditions</i>	59
<i>The time aspect: sporadic and regular participation in hostilities</i>	62
Sporadic participation and loss of protection	62
Continuous direct participation	62
Members of organised armed groups not acting on behalf of a state	63
Spies	66
Mercenaries	66
Special comments on private contractors and security companies	67
Applicable principles in case of doubt whether a person is a lawful target	68
Special comments on child soldiers	69
Special comments on UN forces	69

### **4: Protection and protected persons**

Introduction	71
Protection of combatants and definition of <i>hors de combat</i>	72
Protected personnel and loss of protection	74
Protection of civilians	75
<i>Definition of civilian</i>	75
<i>Protection against the effects of hostilities</i>	76
<i>Protection of persons in the power of a conflict party – general rules</i>	77
<i>Specifics with regard to international armed conflicts</i>	80
Persons enjoying special protection	81
<i>"Special protection"</i>	81
<i>Sick, wounded and shipwrecked persons</i>	81
<i>Missing and dead persons</i>	82
<i>Prisoners of war and interned persons</i>	83
<i>Medical and religious personnel</i>	83
<i>Special comments on women, children and families</i>	84
<i>Special remarks on elderly and disabled persons</i>	86

<i>Refugees and internally displaced persons</i>	86
<i>Foreign nationals</i>	88
<i>Journalists</i>	88
<i>Civilian accompanying the armed forces</i>	89
<i>Civilian civil defence personnel in international armed conflicts</i>	89
<i>Parlementaires</i>	90
<i>Relief personnel</i>	91
<i>Symbols of protection for persons (distinctive emblems)</i>	91
Special comments on peace support forces	92
National information bureau	92

## **5: Medical services and the protection of sick, injured, shipwrecked and dead persons**

Introduction	95
Medical personnel	96
<i>Military medical personnel performing exclusively medical tasks</i>	96
<i>Civilian medical personnel supporting the armed forces</i>	97
<i>Veterinarians</i>	97
Prohibition against activities that may be harmful to the enemy	98
<i>General rule</i>	98
<i>Acts harmful to the enemy</i>	99
<i>Loss of protection and requirement of warnings</i>	101
Arming of medical personnel and the use of force	101
<i>Individual weapons</i>	102
<i>Use of force in self-defence by medical personnel</i>	102
Medical units – medical service buildings and material	103
<i>Definition of medical units</i>	103
<i>Armed sentries</i>	103
<i>The presence of combatant personnel in medical units</i>	103
<i>The presence of weapons and ammunition in medical units</i>	104
<i>Camouflaging of medical units</i>	104
Medical transportation	104
<i>In general</i>	104
<i>Medical aircraft</i>	106
<i>Hospital ships and other medical and rescue vessels</i>	107
Marking with distinctive emblems	109
<i>In general</i>	109
<i>Removal of markings</i>	111
<i>Marking of personnel</i>	112
<i>Marking of installations</i>	112
<i>Marking of vehicles</i>	113
<i>Marking of medical aircraft</i>	113
Treatment of prisoners of war	113
Reporting of possible war crimes	113
Wounded, sick, shipwrecked and dead persons	114
<i>General comments on the treatment of wounded, sick and shipwrecked persons</i>	114
<i>Searches for missing, injured, sick and dead persons</i>	115
<i>Information about the enemy's injured, sick and dead</i>	116
<i>Treatment of the dead</i>	116



## 6: Prisoners of war and interned persons

Introduction	117
I: Prisoners of war	118
In general	118
Actions the belligerent states must take at the outbreak of hostilities	118
Persons belonging to a state party in a conflict	119
Who is entitled to prisoner-of-war status?	119
<i>Special comments on member of the armed forces</i>	121
Exceptions from the requirement to wear a uniform	122
<i>Status of captured medical personnel and religious personnel</i>	123
<i>Sick and wounded prisoners of war</i>	123
<i>Mercenaries</i>	123
<i>Deserters and defectors</i>	124
<i>Spies</i>	124
<i>Civilians</i>	124
<i>War correspondents and journalists</i>	125
Decision on prisoner-of-war status	125
Capture	126
Transport and evacuation	129
Treatment of prisoners of war	130
<i>Use of force against prisoners of war</i>	131
<i>Interrogation of prisoners of war</i>	133
Crimes against prisoners of war	134
Rules during imprisonment in prisoner-of-war camps	134
<i>Placement of prisoner-of-war camps</i>	134
<i>Classification of prisoners of war</i>	135
<i>ID cards</i>	135
<i>Quarters</i>	135
<i>Food</i>	135
<i>Clothing</i>	135
<i>Health and hygiene</i>	136
<i>Religious, intellectual and physical activities</i>	136
<i>Visits and correspondence</i>	136
<i>Work</i>	137
<i>Prisoner representatives</i>	137
<i>Disciplinary and legal sanctions</i>	137
<i>Escape and attempted escape</i>	138
Duration of prisoner-of-war status and repatriation/ transfer	139
II: Security internment	140
In general	140
Conditions for security internment	141
Requirements for treatment and facilities	143
Legal review of security internment grounds	146
Transfer	147
Cessation of security detention	148
III: Depriving criminals of liberty	148
Summary	149

<b>7: Objects that are lawful targets, and protected objects</b>	
Introduction	151
Objects which are lawful targets	151
<i>Nature, location, purpose or use</i>	151
<i>Effective contribution to military actions</i>	152
<i>Definite military advantage</i>	152
<i>The distinction between war support and the general war effort</i>	154
<i>Objects entitled to special protection</i>	154
<i>Cases of doubt</i>	155
Objects entitled to general protection	155
Objects and areas enjoying special protection	155
<i>Protection of cultural property and religious sites</i>	156
<i>Protection of objects indispensable to the civilian population</i>	160
<i>Protection of the natural environment</i>	161
<i>Protection of dams, dikes and nuclear plants</i>	163
<i>Undefended localities</i>	165
<i>Demilitarised zones</i>	166
<i>Prisoner-of-war camps and other installations for captured/interned persons</i>	167
<b>8: Means of warfare (weapons)</b>	
Introduction	169
In general	169
<i>General comments on how the principles influence the choice and use of weapons</i>	171
<i>Prohibition against indiscriminate attacks</i>	172
New weapons – requirement of an international law weapons review	173
Prohibited weapons	174
<i>Cluster munitions</i>	175
<i>Anti-personnel mines</i>	176
<i>Expanding bullets</i>	179
<i>Weapons which produce non-detectable fragments</i>	180
<i>Blinding laser weapons</i>	180
<i>Chemical weapons</i>	180
<i>Riot control agents</i>	181
<i>Biological and bacteriological weapons</i>	181
<i>Poisons</i>	182
Weapons subject to usage restrictions	182
<i>Restrictions on the use of anti-vehicle mines</i>	182
<i>Restrictions on the use of naval mines</i>	184
<i>Restrictions on the use of booby-traps, mines and “other devices”</i>	186
<i>Restrictions on the use of incendiary weapons</i>	187
<i>Explosive projectiles</i>	189
Obligation to clear, remove or destroy explosive remnants of war	190
<i>Less-lethal weapons</i>	191
<i>Controversial, but not prohibited weapons</i>	192
<b>9: Methods of warfare</b>	
Introduction	195
Permitted methods	195
<i>Ruses of war</i>	196

<i>Siege</i>	197
<i>Sabotage</i>	198
<i>War booty</i>	199
<i>Psychological operations (PSYOPS)</i>	199
<i>No-fly zone</i>	200
<i>Maritime exclusion zones</i>	200
<i>Blockade</i>	200
Prohibited methods	200
<i>Perfidy</i>	200
<i>Misuse of emblems, flags and uniforms</i>	201
<i>Reprisals</i>	203
<i>Indiscriminate attacks</i>	203
<i>Shielding of lawful targets using protected persons or objects</i>	203
<i>Deportation and forcible transfer of the civilian population</i>	204
<i>Pillage</i>	205
<i>Starvation of the civilian population</i>	205
<i>Terror among the civilian population</i>	206
<i>Hostage-taking</i>	206
<i>Assassination</i>	206
<i>Quarter and surrender</i>	207
<i>Espionage and gathering of information</i>	207
Cyber operations	209
<i>In general</i>	209
<i>Cyberattacks</i>	209
<i>Distinction during cyberattacks</i>	211
<i>What may be lawfully attacked?</i>	213
<i>Geographical and territorial limitations</i>	214
<b>10: Maritime operations</b>	
Introduction	215
Definitions	216
Neutrality and neutral waters	221
International straits and archipelagic sea lanes	224
Target selection in maritime operations	225
<i>Attacks on enemy warships</i>	226
<i>Criteria governing attacks on enemy merchant vessels</i>	226
<i>Criteria governing attacks on neutral merchant vessels</i>	227
<i>Enemy vessels exempt from attack</i>	228
Methods of warfare in maritime operations	229
<i>Blockade</i>	229
<i>Establishment of maritime exclusion zones</i>	230
<i>Control of the immediate vicinity of maritime operations</i>	233
<i>Surrender</i>	234
Shipwrecked, wounded and sick persons and the duty to assist	234
Measures relating to civilian ship traffic	234
<i>Visit and search of merchant vessels</i>	234
<i>Determining whether a vessel has enemy character</i>	235
<i>Exceptions from the rule on visit and search of neutral merchant vessels</i>	236
<i>Procedures for visit and search of merchant vessels</i>	236
<i>Capture of enemy vessels and cargoes</i>	238

**11: Air operations**

Introduction	241
Airspace and area of operation	241
Categories of aircraft	243
Control of airspace	245
<i>Restricted areas (warning zones/prohibited areas)</i>	245
<i>Exclusion zones</i>	246
<i>No-fly zones</i>	247
<i>Targeting and methods of warfare</i>	247
<i>Lawful targets</i>	248
Military aircraft	248
Paratroopers and other combatants using parachutes	248
Civilian aircraft and military aircraft belonging to a neutral state	249
Lawful targets of land	250
Lawful targets at sea	250
<i>Particular challenges linked to aerial warfare</i>	250
Precautions in attack	250
Choice of means and methods	253
Escalation in use of force	254
Proportionality and indiscriminate attacks	254
<i>Aerial warfare at sea</i>	255
Aerial blockade	255
Surrender	256
Protection of civilian aircraft, airliners and aircraft granted safe passage	256
<i>Civilian aircraft and passenger aircraft</i>	256
<i>Aircraft granted safe conduct</i>	257
Methods not involving the use of armed force	258
<i>Interception, diversion, visit, search and capture</i>	258
<i>Search and rescue</i>	259
<i>Other activities</i>	259

**12: Control and security measures relating to the civilian population during armed conflict**

Introduction	261
Implementation of control and security measures	263
Escalation in the use of force	264
Checkpoints	265
Civilian riots and civil unrest	268
Search of civilian property	270
Search of persons	272
Crime prevention	272

**13: Occupation**

Introduction	275
<i>Start of occupation</i>	275
<i>End of occupation</i>	277
<i>Application of the law of armed conflict</i>	277
<i>The temporary nature of occupation</i>	278
Resistance to occupation	278

<i>Before occupation becomes effective</i>	278
<i>During occupation</i>	278
Administration of occupied areas	278
Maintenance of law and order	280
<i>In general</i>	280
<i>The courts</i>	280
<i>Penalties</i>	281
<i>Resistance to the occupying power</i>	282
Taxed and fees	284
The civilian population in occupied territory	285
<i>In general</i>	285
<i>Use of force against inhabitants of occupied areas</i>	285
<i>Access to food, medicines and medical services</i>	286
<i>Humanitarian assistance</i>	287
<i>Care for and education of children</i>	288
<i>Work and requisitioning of services</i>	288
<i>Practice of religion</i>	289
Enemy property in occupied territory	290
<i>Private property</i>	290
Property and buildings	292
Objects, goods and services	292
<i>Public property</i>	293
National information bureau	294

#### **14: Observing and enforcing the law of armed conflict**

Introduction	295
Reciprocity	295
Knowledge and training requirements	295
Legal advice	296
Consequences of breaches of the law of armed conflict	297
Duty of commanders	298
Individual responsibility	299
Distinction between individual responsibility and state responsibility	301
Disciplinary sanctions	301
Criminal law	302
<i>Criminal responsibility of Norwegian forces under Norwegian Law (jurisdiction)</i>	303
<i>Criminal prosecution of foreign nationals for acts committed abroad</i>	304
<i>Conditions for criminal responsibility under Norwegian law</i>	304
1.Violation of penal provision	305
2.Subjective guilt	305
<i>Mistakes of fact and mistakes of law</i>	306
3.Competence to stand trial – subjective condition of criminal responsibility	308
4.Aiding and abetting and attempt	308
<i>Possible grounds excluding criminal responsibility</i>	308
a.Lawful acts of war	309
b.Orders	310
c.Self-defence	310
d.Necessity	312

<i>Military Penal Code</i>	313
<i>War Crimes</i>	314
War Crimes against persons	315
War crimes against property and civil rights	315
War crimes against humanitarian missions or distinctive emblems	316
War crimes committed using prohibited methods of warfare	316
War crimes committed using prohibited means of warfare	316
Dealing with crimes committed by others	316
Reprisals and reparation: state responsibility	318
<i>Reprisals</i>	318
<i>States' duty to pay compensation for violations of the law of armed conflict</i>	319
Independent supervision/ inspection	319
<i>Protecting power</i>	320
<i>The International Committee of the Red Cross</i>	321
<i>Independent fact finding</i>	321
<i>The UN and the Security Council</i>	322
Annex to chapter 14: War crimes under the Norwegian General Civil Penal Code of 2005	323
<i>Section 103: War crimes against persons</i>	323
<i>Section 104: War crimes against property and civil rights</i>	324
<i>Section 105: War crimes against humanitarian missions or distinctive emblems</i>	324
<i>Section 106: War crime consisting in the use of prohibited methods of warfare</i>	324
<i>Section 107: War crime consisting in the use of prohibited means of warfare</i>	325
<b>15: Rules of engagement</b>	
Introduction	327
General comments on the interpretation and application of rules of engagement	327
Differing use of rules of engagement in peacetime and armed conflict	330
Main categories of rules of engagement	330
<i>Use of force in attack</i>	330
Use of force to counter hostile intent or a hostile act	330
Regulation of offensive use of force	331
<i>Other use of force</i>	332
Minimum use of force and attack	332
<i>Minimum use of force</i>	332
<i>Attack</i>	333
Command and control	333
Development of rules of engagement	334
Soldiers' card	335

# Preface and guidance to users

This Manual of the Law of Armed Conflict is a practical guide for members of the Norwegian Armed Forces to use in planning and conducting operations during armed conflict and in a teaching context. The manual is intended to make the rules of the law of armed conflict more accessible to armed forces personnel, and to reinforce basic attitudes and culture relating to the law of armed conflict at all levels, by gathering the most relevant rules in one place and explaining what they mean. Although this manual will provide answers to many of the legal issues that arise in military operations, there will undoubtedly be situations for which the manual does not provide a clear answer. In such cases, those responsible for planning and leading operations should consult a legal adviser in the Armed Forces. The purpose of this manual is to present Norway's view on how the rules should be applied. However, it is important to be aware that regulations may be amended, and that other instructions and directives may have to be taken into account.

During operations, the scope for action open to Norwegian forces will be determined not only by military conditions, but also politics and legislation. As a result, operational plans, orders and directives will normally restrict the scope for action, meaning that not all actions lawful under the law of armed conflict will necessarily be permitted in every operation. In such cases, the manual must be used subject to limitations arising from the guidance for the particular operation. If the plans, orders and directives of an operation do not provide guidance for the actions to be taken by forces in an armed conflict, Norwegian military personnel are to follow the manual.

The primary target group for the manual is personnel engaged in planning and leading operations at the tactical and operational levels. This has influenced both the language and the structure of the manual. The manual covers a range of operational questions, such as who and what constitute lawful targets, who and what are to be protected, who may be deprived of their liberty, and how attacks should be executed.

The manual is primarily intended for use in operations in which Norwegian forces are engaged in armed conflict. Other regulations will also be relevant to such activities, including the claims law, labour law, the law of the sea, and the law of neutrality. It is particularly important that commanding officers and their legal advisers are familiar with these.

Many of the issues and topics dealt with in this manual are covered in several chapters. To avoid unnecessary overlaps, cross-referencing has been used to identify other places in the manual where users will find further discussion of the same or a related topic.

The first chapter provides an introduction to the law of armed conflict, and it distinguishes the topic from other legal issues, such as the rules governing resort to the use of force against other states as well as human rights law, individual self-defence and the rules of engagement. Since the rules governing resort to use of force against another state (*jus ad bellum*) should logically be considered first, this is the initial topic in the manual. This is followed by a presentation of the law of armed conflict and a clarification of terms such as *attack*, *hostilities* and *war*. An introduction is given to the basic principles of the law of armed conflict. Further, explanations are provided of how and when the law of armed conflict applies and the classification of conflict as either an international or a non-international armed conflict. Finally, the chapter discusses issues raised by legal interoperability in multinational and peace operations, and concludes by distinguishing the law of armed conflict from other legal issues.

Chapter 2 covers the law of armed conflict's regulation of attacks, with a focus on targeting and the rules on precautions in attack. The chapter provides a short introduction to who and what shall constitute a lawful target, and it discusses the degree of certainty one must have that something or someone is a lawful target before attacking. The prohibition against indiscriminate attacks and the proportionality rule are then considered, followed by discussion of the duty to take feasible precautions in order to avoid or minimize collateral damage resulting from the attack. Among other things, the manual comments on how this duty influences the choice of means and methods of attack, the potential issuance of warnings and various other considerations relating to dynamic and pre-planned targeting.

This introductory chapter on the conduct of attacks is followed by a more detailed discussion of questions relating to the conduct of operations. Chapter 3 discusses the categories of people who are lawful targets and the conditions for qualifying as such, while chapter 4 covers the general rules on civilian protection as well as the entitlement to special protection. Chapter 5 describes the special rules applicable to medical services and the protection of sick, injured, shipwrecked and dead persons, both in terms of their entitlement to protection and the tasks they may perform without losing such protection. Chapter 6 contains an overview of the rules governing treatment of persons deprived of their liberty and the categories into which they fall: prisoners of war, security detainees and criminals. Chapter 7 discusses objects: which objects are lawful targets, and which objects enjoy protection from attack?



Chapters 8 and 9 deal with lawful and unlawful means and methods of warfare. Chapter 9 also contains an introduction to the regulation of cyber operations under the law of armed conflict. Chapters 10 and 11 focus on maritime and air operations, and discuss issues particular to these. Although the manual as a whole applies to all types of operations, separate rules have been developed for naval and aerial warfare because the law of armed conflict focused originally on land warfare.

The law of armed conflict concentrates primarily on the lawfulness of attacks, including who and what are lawful targets and who and what enjoy protection from attacks. However, other activities relevant to Norwegian forces in the conduct of operations are also subject to regulation. Some of these activities are discussed in chapter 12, titled “Control and security measures towards the civilian population during armed conflict”. The topics in chapter 12 include escalation of the use of force, checkpoints, and civilian riots and civil unrest.

Chapter 13 covers the law of belligerent occupation. The law of occupation defines a number of obligations and rights on the part of the occupying power. Such rules could be relevant to Norwegian forces if they participate, for example, in a multinational operation resulting in the occupation of another country.

Chapter 14 focuses on enforcement of and compliance with the law of armed conflict, including the consequences of violating it. The chapter explains the set of conditions under which one may be held individually responsible for one’s actions (individual responsibility) and what is required to be held criminally liable for the acts of subordinates (command responsibility). In most cases, a violation of the law of armed conflict will amount to a criminal offence. Thus, the focus of chapter 14 is on conditions for individual criminal responsibility as well the possible grounds for excluding criminal responsibility, and war crimes.

The final chapter, chapter 15, contains a brief introduction to the rules of engagement, covering both what they are and how they regulate the use of force. The rules of engagement are based in part on applicable legal rules, including the law of armed conflict, and are therefore an available tool for commanding officers to ensure compliance with the law of armed conflict.

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This manual has been developed by a project group at the Norwegian Defence University College on assignment for, and with the approval of, the Ministry of Defence. The project group has comprised Camilla Guldahl Cooper and Lars Morten Bjørkholt.

The purpose of this manual is to set out Norway's view on how the rules should be applied. Since the manual has simplified many scenarios and the regulatory framework is subject to change, it should not be regarded as a definitive source of analysis and answers when the matters in question are unclear. In some cases, there may be orders and guidelines issued which are more restrictive than the provisions described in the manual.

# 1

## Introduction

- 1.1 This chapter provides an introduction to the law of armed conflict and identifies topics not addressed in further detail in this manual.

### International law

- 1.2 States use international agreements to regulate the various ways in which they interact. This system of inter-state agreements, or treaties, is referred to as international law. One of the areas regulated by states is the use of military force. Both the right of a state to employ armed force against another state (Latin: *jus ad bellum*) and the rules on how an armed conflict is to be fought (Latin: *jus in bello*; other terms include the law of armed conflict or international humanitarian law) are regulated by international conventions and customary international law, i.e. written and unwritten law. Although the manual's focus is the law of armed conflict, this chapter also gives a brief introduction to the rules governing the right of states to use force.

#### ***JUS AD BELLUM* and *JUS IN BELLO***

*Jus ad Bellum*: rules governing when states are authorised to intervene or to use armed force against another state.

*Jus in Bello* (also referred to as the law of armed conflict): rules governing the conduct of military operations in the context of armed conflict.

### Legal basis for the use of force – *jus ad bellum*

- 1.3 The general rules on international peace and security are found in the UN Charter of 1945. A basic rule under international law is the prohibition on the

use of force and the threat of use of force against another state.<sup>1</sup> This does not mean that armed conflicts will not arise or that armed conflicts as such are prohibited. There are several exceptions to the basic rule, and these are presented in sections 1.6–12 below. Sometimes, the rules are not observed. Where one state uses armed force against another state, whether in compliance with international law or not, and an armed conflict emerges, the law of armed conflict will always apply to the actual conduct of hostilities. The law of armed conflict is based on a recognition that war and armed conflict are unavoidable, and that rules are therefore necessary to reduce unnecessary suffering and injury to both civilians and combatants when a war or armed conflict has materialised. The law of armed conflict applies irrespective of who initiated the armed conflict, and irrespective of whether the parties to the conflict themselves classify the situation as an armed conflict.

To keep the topics of *jus ad bellum* and *jus in bello* separate, it is necessary to define which issues relate to which topic. Accordingly, a brief introduction to *jus ad bellum* is provided before an introduction is given to the law of armed conflict.

### ***The basic prohibition against the use of force and intervention***

- 1.4 According to the UN Charter, states undertake to settle international disputes by peaceful means. They may not threaten or use armed force against the territorial integrity or political independence of any state. Nor may states intervene in matters which are essentially within the domestic jurisdiction of other states (intervention).<sup>2</sup>
- 1.5 The prohibition against the use of force and the prohibition against intervention are based on states' right to respect for their territorial integrity and the right of states to handle their own domestic affairs (the principle of sovereignty). The primary purpose of the prohibitions is to maintain international peace and security. The prohibition against the use of force also influences a state's ability to use armed force against non-state entities in the territory of another state. The use of force against non-state entities without the permission of the state in which these entities are located may thus constitute an infringement of that state's sovereignty. However, the prohibition does not regulate a state's use of armed force against groups of persons located in its own territory, although this does not mean that states are free to do what they want within their own territories. Use of force by a state in its

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<sup>1</sup>*The Charter of the United Nations of 26 June 1945 (the UN Charter), Article 2(4).*

<sup>2</sup>*UN Charter, Articles 2(3), 2(4) and 2(7).*

own territory in connection with armed conflict is governed by national law, the law of armed conflict and other relevant international law obligations, such as human rights.

### *Exceptions from the prohibition against the use of force against other states*

- 1.6 In order not to violate international law by the use of armed force against another state, the situation must be covered by one of the following three exceptions from the prohibition against the use of force: a mandate from the UN Security Council, the State's right to self-defence, or consent.

#### UN mandate

- 1.7 An important exception from the prohibition against the use of armed force against another state or against a group in another state is a mandate from the UN Security Council. The UN's primary task is to find peaceful solutions to international conflicts.<sup>3</sup> The UN Charter chapters VI and VII authorises the Security Council to decide upon a number of non-military measures of both a voluntary nature (chapter VI) and a binding nature (chapter VII). Examples of measures not involving the use of armed force include voluntary mediation and binding sanctions. Where such measures are unsuccessful or are deemed insufficient, the Security Council may authorise the use of armed force by adopting a resolution under chapter VII.<sup>4</sup> In order for the Security Council to be able to adopt such a resolution, it must conclude that a situation exists that threatens international peace and security such that it is necessary to authorise the use of armed force.<sup>5</sup> The Security Council may issue mandates specifying different degrees and forms of military intervention and armed force. This may be done by establishing a UN-led operation or by giving a mandate to the UN member states, either individually or through regional organisations such as NATO, the African Union or the European Union. Norway's participation in ISAF in Afghanistan (from 2003) and in Libya (from 21 March to 1 August 2011) was based on such mandates, which are often referred to as "chapter VII mandates".
- 1.8 Military operations based on a chapter VII mandate will in many cases involve the use of armed force with such an intensity that the situation may be classified as an armed conflict, although this does not necessarily have to be the case. In some situations, the Security Council may choose to issue a

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<sup>3</sup> UN Charter, Article 33.

<sup>4</sup> UN Charter, Articles 41 and 42.

<sup>5</sup> UN Charter, Article 39.

robust mandate that provides for the possible escalation of the situation into an armed conflict. The use of such robust mandates is increasing. This approach is the result of previous experiences, some of them highly negative, including situations where the Security Council mandate did not allow for the measures necessary to deal with the situation the military operation was intended to resolve. Accordingly, a chapter VII mandate may exist even though no armed conflict exist on the day of the mandate's issuance or later. It is the factual situation that determines whether a situation is to be considered an armed conflict and, if so, what type it is. The view of the situation taken by the UN Security Council or UN General Assembly will give an indication, at any rate, of the sort of conflict we face. To determine whether a situation may be characterised as an armed conflict, focus must therefore be put on whether the conditions of armed conflict presented in sections 1.29–40 below are met.



*Norwegian uniform with a UN emblem. Norwegian forces have participated in numerous UN-led operations. Photo: Taral Jansen/Norwegian Armed Forces Media Centre.*

## States' right to self-defence

- 1.9 An armed attack on a state gives that state the right to act in self-defence in accordance with international law.<sup>6</sup> Article 51 of the UN Charter provides an independent basis for the use of force, but is conditional upon immediate reporting to the Security Council, and is valid only until the Security Council has itself implemented measures to maintain international peace and security. To be lawful, a state's use of armed force in self-defence against an armed attack must be necessary and proportionate. In practice, this means that there must be no alternative means of protecting the state against the armed attack. In addition, the use of force must be proportionate to the threat which is to be halted or repelled. A state is permitted to use force in self-defence both against an ongoing attack and against an imminent armed attack (referred to as the preventive self-defence). Once the attack has been halted or repelled, the use of force in self-defence must also cease. States that act in self-defence may request support from other countries. This is referred to as collective self-defence. NATO is an organisation that is based on the right to engage in collective self-defence.<sup>7</sup>
- 1.10 In Norway's case, it is up to the government to evaluate and determine whether Norway is subject to an armed attack such that Norway may act in self-defence in accordance with international law. It is the job of the Norwegian Armed Forces to defend Norway against such armed attacks. The government is also responsible for assessing whether Norway, as a result of the attack, is confronted with an armed conflict that should be dealt with by the armed forces.<sup>8</sup> If a situation arises where the government is no longer in control, the "poster on the wall" (Directives for commissioned and non-commissioned officers and military commanders upon an attack on Norway)<sup>9</sup> lays out detailed rules on actions to be taken (see the fact box "Armed attack on Norway?" below).

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<sup>6</sup> UN Charter, Article 51.

<sup>7</sup> UN Charter, Article 51, and the North Atlantic Treaty (NATO treaty), Article 5.

<sup>8</sup> The Norwegian Constitution, Article 26.

<sup>9</sup> Royal Decree of 10 June 1949: "Directives for commissioned and non-commissioned officers and military commanders upon an attack on Norway".

## ARMED ATTACK ON NORWAY?

In principle it is the King in Council, which is to say the government, that has the power to decide to deploy the Norwegian Armed Forces to defend Norway against an attack on its territory. If the government is unable to gather to make this decision, another state entity, such as the Ministry of Defence, may decide to summon troops. That entity would then be acting out of necessity on the state's behalf, a principle known as “constitutional necessity”.

An example of constitutional necessity is the Elverum Authorisation of 9 April 1940, which authorised the King “to make all decisions needed to safeguard the interests of the realm until the Storting – after consultation with the government and the presidium of the Storting – can be reconvened”. Another example is the government's decision to mobilise the Norwegian Army before 5 a.m. on 9 April 1940, apparently violating Article 28 of the Norwegian Constitution, which governs how the Council of State's is to treat “matters of importance”.

“The poster on the wall” is a directive that authorises the armed forces to mobilise immediately and fully in the event of an armed attack on Norway if the government is no longer in control. “The poster on the wall” sets out the duty of commissioned and non-commissioned officers and military commanders to defend the country against attack. An armed attack is deemed to constitute orders to mobilise immediately and fully. In other words, there is no need to invoke constitutional necessity to implement such mobilisation and defence of Norway.

Official Norwegian Report (NOU) 1995:31, *Emergency Preparedness Legislation in Light of the New Regulatory Framework for Defence and Security Policy*, parts 4.1 and 5.1.



## Consent

- 1.11 If a state consents to one or several other states using armed force in that state's own territory, such use of force does not constitute a breach of the prohibition against use of force and intervention. In other words, such actions do not violate the state's right to respect for its sovereignty. For example, a state experiencing difficulties in fighting rebel groups in its own territory may ask other states for help to deal with the problem, although the international forces would be obligated to withdraw as soon as their presence is no longer desired.
- 1.12 An important practical example of consent situations is that of UN peacekeeping operations based on Security Council resolutions under chapter VI of the UN Charter, such as UNIFIL. In the case of such operations, the consent of the affected state has been obtained and constitutes the basis for the formulation of the mandate.

### SUMMARY: *JUS AD BELLUM*

#### General principle:

States may not threaten or use armed force against the territorial integrity or political independence of other states, or otherwise inconsistent with the purposes of the UN. Nor may states intervene in matters which, due to their nature, belong essentially within the domestic jurisdiction of other states.

#### Exceptions:

- a. Mandate from the UN Security Council
- b. States' right of self-defence
- c. Consent

## Introduction to the law of armed conflict – *jus in bello*

- 1.13 As stated initially, the law of armed conflict aims to reduce unnecessary suffering during armed conflict, not least by granting protection to vulnerable groups. The protection of international law was originally intended for soldiers who were no longer able to participate in combat due to, among others, sickness or injury, and for that reason should no longer be regarded as lawful targets. Rules were also developed to limit the means and methods of warfare permitted to be used against soldiers. Examples include the prohibitions against poisonous gas weapons, expanding ammunition and other types of weapons calculated to cause unnecessary injury or suffering. After the experiences of World War II, in which fighting affected the civilian population to a greater extent than before, protection was expanded to include civilians. Today, as a result, all persons not directly participating in hostilities are entitled to protection from attack. Direct participation in hostilities is discussed further in chapter 3.
- 1.14 In order to make it practically possible to fight by the rules, the focus on protection must be balanced against the legitimate need of states to undertake military operations and achieve the objectives set by political authorities. For example, subject to certain conditions, the law of armed conflict grants lawful combatants the right to take actions that would otherwise violate national law. During an armed conflict it may be permissible to take lives or destroy the property of other persons, for instance, as long as such actions are deemed a lawful act of war under the law of armed conflict. Lawful combatants may not then be penalised for such actions under national criminal law.

### *Terminology*

#### War and armed conflict

- 1.15 The first rules in the law of armed conflict focused on the term “war”.<sup>10</sup> Older regulations, such as the right of neutrality, therefore employ the term war. “War” referred to an armed conflict between two or more states and assumed that the parties had formally declared war. Today, the word “war” is used in many different contexts, and is often imprecisely defined. The ongoing debate

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<sup>10</sup> Examples: the St. Petersburg Declaration of 1868 Renouncing the Use, in Time of War, of Explosive Projectiles; the Hague Declarations of 1899; the Hague Conventions of 1907.

over the term “war” when describing Norwegian participation in international operations is one example of this. There are several legal reasons for not wishing to use of the word “war”, and indeed for why the word should not be used, in connection with international operations such as the one in Afghanistan. One reason is that, as stated above, the term “war” presupposes a formal declaration of war between two states. Further, the application of the law of armed conflict is no longer linked to the term “war”, but instead to “armed conflict”. Accordingly, it is irrelevant for the purposes of the law of armed conflict whether an armed conflict is also termed a war. In addition, the use of the term “war” would have a number of domestic legal consequences in Norway. That is because war has a certain meaning in Norwegian law, as is reflected in the country’s legislation on emergency preparedness, among other measures; yet it is unnatural to apply that meaning to the participation of Norwegian forces in an armed conflict outside Norwegian territory. When at war, for example, the Norwegian state may call up manpower for military and civilian purposes or demand the surrender of private property.<sup>11</sup>

- 1.16 In connection with the negotiation of the Geneva Conventions of 1949, it was decided that the application of the conventions should not be dependent upon a formal declaration of war. This was done because states, for political reasons, often deliberately avoided calling a situation war. The condition that was introduced instead was for a state of actual “armed conflict” to exist between two or more states, or for a non-international (internal) armed conflict to have arisen. The application of the law of armed conflict is thus linked to the factual situation, and is no longer dependent upon formal state declarations. In other words, a situation must exceed the threshold for armed conflict in order for the law of armed conflict to apply. These conditions are discussed further in section 1.29 onwards, particularly 1.33 and 1.37.

### Attack, military operations and hostilities

- 1.17 Different terms are used to describe the connection between a person or act and an armed conflict. “Attack” is the most specific of these terms, and describes acts of violence against the adversary, whether in offence or in defence.<sup>12</sup> The definition of attack is particularly relevant to chapter 2, “Targeting”, and is discussed further in section 2.2. It is prohibited to attack civilians or civilian objects.<sup>13</sup>

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<sup>11</sup> Act of 15 December 1950 No. 7 relating to special measures in time of war, threat of war and similar circumstances (the Preparedness Act).

<sup>12</sup> Additional Protocol I, Article 49(1).

<sup>13</sup> Additional Protocol I, Articles 51(2) and 52(1).

- 1.18 “Military operations” is a broader term than attack, and includes all movements and activities by armed forces in connection with hostilities, i.e. in connection with the planning and use of means and methods of warfare. Attack is therefore an aspect of military operations, although the term “operations” will also encompass activities not intended to cause injury or destruction. Military operations as defined above may only be directed at lawful targets.<sup>14</sup> However, other movements and activities which are not related to hostilities may target civilians. One example is psychological operations (PSYOPS), focusing on the civilian population with the aim of securing increased moral support from it. The term “military operations” as used in international law covers all command levels.
- 1.19 “Hostilities” is the collective term used to describe means and methods of warfare intended to harm the enemy. Acts of violence are therefore a key aspect of this term. Nevertheless, hostilities are not limited to attacks or acts involving the use of armed force; they also include non-violent actions which cause damage or are directly linked to a military operation, such as logistics, capture and intelligence-gathering. Hostilities may be carried out by a state’s armed forces or by non-state parties to an armed conflict. The term must be distinguished from general war efforts, such as work in an ammunition factory or financing, which are not considered hostilities, and from non-military uses of force like the exercise of police authority.

### The law of armed conflict

- 1.20 This manual uses the term “the law of armed conflict” rather than the synonyms *jus in bello* and “international humanitarian law” when referring to the rules of warfare.

### *Basic principles of the law of armed conflict*

- 1.21 The law of armed conflict is based on four principles: distinction, military necessity, humanity and proportionality. These principles are regarded as customary international law, meaning that they are binding on all entities, both state and non-state. The specific rules and treaties of the law of armed conflict are different expressions of these general principles. The principles overlap to some degree, and together constitute the fabric of the law of armed conflict as applicable to both international and non-international armed conflicts. Generally speaking, the principles are an integrated part of the specific rules of the law of armed conflict, and come into use through them. However, the principles also play a very important role in cases where the specific rules are

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<sup>14</sup> Additional Protocol I, Article 48.

unclear, or where, for example, a state claims not to be bound by certain conventions and protocols.<sup>15</sup> For example, the principles of humanity (in the form of the prohibition against causing unnecessary suffering), distinction and proportionality will impose clear limitations on all types of weapons, whether or not they are regulated or prohibited by special conventions. Both the weapons themselves and their use must comply with these principles as expressed in the general rules of the law of armed conflict (see chapter 8).

## Distinction

- 1.22 The law of armed conflict requires a distinction to be made in military operations between combatants and military objectives on the one hand – which constitute lawful targets in an armed conflict – and civilians and civilian objects on the other, which must be protected and respected. Military operations may only be directed at lawful targets, such as soldiers, military vehicles, weapons, ammunition or a factory producing weapons. In order to comply with this requirement and give effective protection to persons and objects entitled to such protection, it is important that both persons and objects that are lawful targets be distinguished from civilians and civilian objects. Such distinction can be achieved through the wearing of uniforms or the use of markings. To prevent military attacks on lawful targets from causing incidental harm to civilians, military installations should moreover not be located close to the civilian population. The principle of distinction will be discussed separately in the chapters on persons and objects that constitute lawful targets and enjoy protected status.

## Military necessity and humanitarian considerations

- 1.23 The principle of military necessity grants military forces permission to use force necessary to achieve military objectives, typically to weaken enemy forces militarily. Thus it is prohibited to direct attacks against civilians and civilian objects: such attacks cannot be regarded as necessary.
- 1.24 Certain acts that in principle are necessary are subject to limitations based on humanitarian considerations. Attacks on enemy combatants are permissible at all times, for instance, but there is a prohibition against methods and means that inflict superfluous injury or unnecessary suffering on combatants.<sup>16</sup> Attacking lawful targets is permitted even if it results in incidental civilian damage, injury or loss of life, but carrying out an attack that may be expected

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<sup>15</sup> The “Martens clause” in the preamble to Hague Convention IV of 1907: *Respecting the Laws and Customs of War on Land*.

<sup>16</sup> *Additional Protocol I*, Article 35(2).

to cause incidental damage which would be excessive is prohibited (the proportionality principle). Further, the destruction of enemy property is permitted if militarily necessary, but the wanton destruction of property is prohibited (for example in the form of pillage). The principle of military necessity thus influences both target selection specifically (chapter 2) and the choice of means and methods of warfare in general (chapters 8 and 9). Humanitarian considerations are particularly relevant to the chapters dealing with the protection of civilians (chapter 4) and the treatment of persons who have been interned or captured (chapter 6).

- 1.25 As a rule, military forces themselves are not required to conduct an analysis that balances military necessity against humanitarian considerations. In most cases, such an assessment will already have been incorporated into the rules. Moreover, in situations where the law of armed conflict prohibits certain acts, military necessity cannot be invoked as exception, unless being explicitly provided for in the rule. Military necessity was assessed at the time the prohibition was laid down. An example that has received much attention across history is the absolute right of prisoners of war and other captured persons to protection from being killed when they are no longer participating in the hostilities (*bors de combat*). The prohibition against killing persons *bors de combat* is absolute, even if compliance with the prohibition may cause substantial inconvenience and/or risk, as in the case of a small unit that wishes to conceal its position in enemy territory and thus finds it difficult to keep prisoners. The prescribed legal solution in such cases is to release the captured person(s).

### Proportionality

- 1.26 The proportionality principle states that the military advantage anticipated to be gained by military attack shall be weighed against the civilian losses and damage that may be expected from the same attack. Attacks causing civilian damage or losses disproportionate to the concrete and direct military advantage anticipated, are prohibited.
- 1.27 “Civilian losses and damage” refers only to physical destruction and damage, and not, for example, inconvenience. Further, only civilian losses and damage are to be included in a proportionality assessment, not damage and suffering inflicted on the adversary’s military forces. When assessing expected civilian losses and damage, the initial focus is to be the kinds of damage which must be deemed reasonably foreseeable (likely) based on factors such as information obtained about the area, including the number of inhabitants and similar facts, general knowledge of the extent of damage normally caused by the type of

weapon in question, and other reasonably available information. Only expected losses are included in the assessment. In other words, the proportionality of an attack cannot be assessed from information unavailable at the time of the attack.

- 1.28 When assessing military advantage, it is the anticipated concrete and direct military advantage that shall be assessed, not the actual result of the attack. This means that allowance is made for both technical and human failure in the planning and conduct of operations, provided that those responsible have acted reasonably under the circumstances. A clear requirement is that those who plan, order and conduct military operations have done everything feasible to obtain situational awareness. The meaning of “everything feasible” is discussed in section 2.6. In addition, those in charge must do everything feasible to minimize or avoid incidental civilian damage, injury or loss of life, in order to limit the collateral effects to the unavoidable. The proportionality principle is discussed further in chapter 2.

#### THE PRINCIPLES IN PRACTICE

An attack is planned on a weapons factory. The weapons factory is a lawful target, whereas the persons working there are civilians. It may be considered necessary to attack the factory, but the principle of distinction requires civilians to be distinguished from military objects. This means that the attack is to be directed at the weapons factory and not the civilian workers. In addition, civilian workers must be protected against the effects of combat activity wherever possible, as required by the principle of humanity. Incidental civilian damage, injury or loss of life must therefore be avoided as far as possible. One way of avoiding, or at least minimizing, civilian losses is to attack at night or to give notice of the attack a short time in advance. Only unavoidable losses are excusable.

The weapons factory is considered a high value military target because it is the enemy's only source of weapons and ammunition. In a situation like this, humanitarian considerations would have to be significantly high, in order to compel the armed force to refrain from the attack. Provided that the civilian losses are unavoidable and the extent of such damage/losses is not disproportionate to the military advantage anticipated, civilian damage or losses will not amount to a violation of international law. In other words, the proportionality principle provides that an attack will be lawful only if the unavoidable expected civilian losses are proportionate to the military advantage that is anticipated from the attack.

## Classification of conflicts and applicable law: international and non-international armed conflicts

- 1.29 An armed conflict is a conflict between states or groups involving the use of armed force. There are two categories of armed conflict: international and non-international. An international armed conflict exists when two or more states use armed force against one another. Where extensive use is made of weapons in a conflict between government forces and organised armed groups, or between such groups within a state, a non-international armed conflict exists. These two categories are defined further in sections 1.33–40.
- 1.30 Traditionally, the rules governing these two conflict categories have been quite different, as is now reflected in the written rules. A significant difference has also existed with regard to which states have ratified the various conventions and protocols. In recent years, this difference has diminished because most rules applicable to international conflicts are now also applied to non-international conflicts, either because states regard the rules as customary international law (unwritten rules) or because they choose to apply them for political reasons. Customary international law is binding on all parties, whether or not they have ratified a given treaty. Nevertheless, some important differences should still be noted.

### *How and when does the law of armed conflict apply?*

- 1.31 The law of armed conflict applies from the point in time that an international or non-international armed conflict arises; see sections 1.33–40 below. There is no requirement specifying how many persons must have been killed or injured or how much damage must have been caused to enemy property. The law of armed conflict must be followed wherever the conditions for the existence of an armed conflict are met.<sup>17</sup> One exception to this rule applies where a state occupies all or parts of a territory after the cessation of hostilities between the parties. In such cases, certain aspects of the law of armed conflict will no longer apply after one year.<sup>18</sup> Occupation is discussed further in chapter 13.
- 1.32 The law of armed conflict generally applies throughout the territory or territories of the country or countries in which a conflict takes place. This will also be the case when a conflict affects only part of a territory. In addition, the law of armed conflict will apply to relations between belligerent states in international waters and airspace.

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<sup>17</sup> *Additional Protocol I, Article 3.*

<sup>18</sup> *Geneva Convention IV, Article 6.*



## *International armed conflicts*

- 1.33 An international armed conflict therefore exists when two or more states engage in violence. As indicated, states have a duty to respect the sovereignty of other states. Any use of armed force by one state against another will therefore in principle have to be regarded as a breach of the principle of sovereignty and the UN Charter. Since the use of force between states is subject to a fundamental prohibition, the threshold is low for determining the existence of an international armed conflict. However, this does not mean that all breaches of the sovereignty principle automatically constitute an international armed conflict. For example, an armed conflict will not automatically be a fact if use of force or a violation of sovereignty is due to an accident or error. Examples of such accidents or errors may include border-control troops reading maps incorrectly and thus crossing into a neighbouring country without being aware of the fact, or a border-control soldier starting to shoot across the border on his own initiative and without provocation. Often, such situations can be resolved through diplomatic dialogue, thus avoiding an armed conflict, but this will depend on the state of relations between the countries prior to the border incident.
- 1.34 There is no requirement that the involved states themselves acknowledge an armed conflict. Nor does an attack have to be met by military resistance. The rules governing international armed conflict therefore also apply in cases where a state occupies all or parts of the territory of another state.<sup>19</sup> The rules apply additionally to armed conflicts in which peoples fight against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination,<sup>20</sup> although the final point is controversial and has never been used.
- 1.35 A number of conventions and treaties are applicable in the event of armed conflict. In addition, other international rules continue to apply when an armed conflict arises. Key rules on international armed conflicts are found in:
- Geneva Conventions I–IV of 1949, with additional protocols I and III
  - The Hague Conventions of 1899 and 1907, particularly Hague Convention IV of 1907, also known as the land warfare regulations, or the 1907 Hague Regulations.
  - A number of conventions regulating or prohibiting specific weapon types, such as the following:
    - St. Petersburg Declaration of 1868 Renouncing the Use, in Time of

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<sup>19</sup> *Geneva Conventions I–IV, common Article 2.*

<sup>20</sup> *Additional Protocol I, Article 1(4).*

#### War, of Explosive Projectiles

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW, 1980), with protocols
  - Chemical Weapons Convention (1993)
  - Anti-Personnel Mine Ban Convention (1997)
  - Convention on Cluster Munitions (2008)
- Customary international law
  - International human rights law (see sections 1.52–54 below).

### *Non-international armed conflicts*

- 1.36 Non-international armed conflicts include all armed conflicts which are not between states.<sup>21</sup> A non-international armed conflict may therefore arise between a state and a group within the territory of that state, between a state and a group located in another country, or between different groups. Generally speaking, the conflict will still be non-international if the state is supported by other states, as long as the enemy remains a non-state group. However, if the group receives armed military support from another state, the situation may represent both a non-international armed conflict between the state and the armed group and, simultaneously, an international conflict between the state and the state that has intervened militarily in support of the armed group. For that to be the case, however, the involvement of the latter state must be such that the situation between the two states qualifies as an armed conflict.
- 1.37 Since states are permitted, subject to certain restrictions, to use force to maintain law and order in their own territories, it will in some cases be unclear whether a non-international armed conflict exists. Internal unrest and tense situations such as riots, isolated or sporadic acts of violence and similar occurrences are not regarded as armed conflicts.<sup>22</sup> As regards Norway, it can be said that the threshold for the existence of a non-international armed conflict will be exceeded if the police for different reasons are no longer able to deal with the situation, or are no longer the right authority to do so, and military forces therefore take over responsibility. The reasons could be found in the level of threat, the type of threat faced and/or the available resources.
- 1.38 Armed conflicts between a state and one or more groups within the same country are often referred to as civil wars. “Civil war” is a popular term for a

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<sup>21</sup> *Geneva Conventions I–IV, common Article 3; Additional Protocol II, Article 1(1).*

<sup>22</sup> *Additional Protocol II, Article 1(2).*

non-international armed conflict occurring within the territory of a state, but the term has no legal meaning.

- 1.39 Armed conflicts between a state and a group located in the territory of another state can be divided into two categories: conflicts in which the state also deploys forces to the territory of the other state, such as Norway's participation in Afghanistan in support of the Afghan government, and conflicts in which the state does not do so. The latter category is international in nature because it crosses an international border, but since there is no armed conflict between two or more states, the rules governing non-international armed conflict are those that apply.
- 1.40 Non-international armed conflicts are governed by the following:
- Common Article 3, i.e. the identical Article 3 in Geneva Conventions I–IV.
  - Additional Protocol II to the Geneva Conventions, provided that the conditions in Article 1 of the protocol are met.
  - Additional Protocol III to the Geneva Conventions.
  - Most weapons conventions mentioned in section 1.35 above are also applicable to non-international conflicts.
  - Customary international law, i.e. most of the rules relating to international armed conflicts.
  - Human rights law (see sections 1.52–54 below).

#### TYPES OF CONFLICT

##### International armed conflicts:

- Armed conflict between two or more states
- Occupation

##### Non-international armed conflicts:

- Armed conflict between a state and a group in the territory of the state
- Armed conflict between a state and a group in the territory of another state
- Armed conflict between different groups

### *How non-international armed conflicts are dealt with in the manual*

- 1.41 In principle, the manual in its entirety applies to all types of armed conflict.

1.42 In some cases, the rules on international and non-international armed conflicts do still differ. The most important differences relate to:

- the threshold for defining when an armed conflict can be said to exist, which often will be somewhat lower in the case of international armed conflicts than in the case of non-international armed conflict
- the definition of lawful combatants, i.e. persons who enjoy immunity from domestic criminal prosecution for lawful acts of war
- the conditions under which an adversary may be deprived of liberty, the status granted to captured persons, and the procedural rules to be applied, such as the duration of capture. Rules governing prisoner-of-war status are among those that apply only in the context of international armed conflicts.

### *Legal sources*

1.43 This manual is based on primary sources, i.e. conventions, protocols and customary international law. Further, it only reflects international agreements by which Norway is bound. This is because the manual presents the Norwegian view on the rules of armed conflict and how these apply to Norwegian forces.

#### HISTORICAL EXAMPLES

##### International armed conflicts:

- An international coalition of states, including Norway, against Libya, 2011
- Russia-Georgia, August 2008
- The United States and the UK against Iraq, 2003–2004
- The United States and other countries against Afghanistan, September to December 2001
- An international coalition of states, including Norway, against the former Yugoslavia, 1999
- Israel-Lebanon, 1982–1983
- Iran-Iraq, 1980–1988.

##### Non-international armed conflicts:

- The Afghan government, with the support of ISAF, against insurgents in Afghanistan, December 2001–present.
- Sri Lanka against the Tamil Tigers, 1983–2009.
- The Yugoslav Wars, 1991–2001.
- Rwanda, 1994.
- Sudan, 1955–1972, 1983–2005.

## Neutrality

- 1.44 States not participating in an ongoing armed conflict shall be regarded as neutral. The belligerent parties must respect this by refraining from engaging in acts of war in the territory of neutral states and by ensuring that the effects of warfare do not cause damage in the territory of neutral states.<sup>23</sup> This means for example that combatants, military vehicles and other means of warfare may not cross the border into neutral territory, even for a brief period. That long-range weapons delivered from third countries may not land in neutral territory, and that aerial and sea blockades must be enforced in such a manner that neutral states are able to transport goods in and out of their own territories.
- 1.45 To retain their neutral status, states must refrain from participating in or contributing to an ongoing armed conflict, and must avoid allowing a belligerent party to use their territory for military purposes, such as the establishment of training camps or military headquarters. In addition, neutral states have a duty to treat the parties equally as regards the rights of passage on land, at sea and in the air, and with respect to international trade.<sup>24</sup> Purely political support for a party to a conflict will not affect the neutrality of the state in question under the law of armed conflict.

## Issues relating to legal interoperability in multinational operations

- 1.46 Norwegian participation in armed conflicts will normally be restricted to participation in multinational operations, as in the case of its presence in Kosovo, Afghanistan and Libya. In such situations, practical challenges may arise because not all countries are signatories to the same international conventions. Norwegian forces shall always comply with Norwegian obligations, including those presented in this manual, even when they are under the command and control of another state.<sup>25</sup> This is particularly relevant with respect to different types of weapons, as other countries may be permitted to use certain types of weapons that Norway is prohibited from. Examples in this regard include anti-personnel mines and cluster munitions.

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<sup>23</sup> *Hague Convention V of 1907, particularly chapter 1, and Hague Convention XIII of 1907.*

<sup>24</sup> *UN Charter, Article 2(5) and Hague Conventions V and XIII of 1907.*

<sup>25</sup> *Section 26 of the Regulations relating to service in international operations (FOR 2004-12-10 No. 1643).*

- 1.47 The fact that the forces of other states may act in a manner prohibited to Norwegian forces will not necessarily prevent Norwegian participation or other cooperation. Because of Norway's obligations, Norwegian forces may not carry out or participate in such actions, or encourage the forces of other states to engage in such actions. For example, Norwegian forces may not encourage others to lay anti-personnel mines around a joint camp. Nor is it permissible to urge other states to use cluster munitions in support of Norwegian soldiers, for example when close air support is required. If other forces, without Norwegian involvement, make use of such munitions and Norwegian forces achieve a military advantage as a result, this circumstance will not in itself constitute a violation of international law.

Read more about interoperability in chapter 8: "Means of warfare".

## Issues relating to peace support operations

- 1.48 Peace support operations are operations authorised under chapter VI or chapter VII of the UN Charter, which have the objective of securing long-term political solutions or achieving other specific goals. There are several categories of peace support operations. The most relevant types of peace support operations are peacekeeping operations and peace enforcement operations. Peacekeeping operations are operations in which the parties to the conflict consent to the presence of international forces that peacefully monitor and seek to facilitate a peace agreement. Generally speaking, participation in peacekeeping operations does not mean that a participating state is considered a party to an armed conflict. Peace enforcement operations are operations intended to preserve or restore peace or to pursue objectives in an operational mandate with the necessary means, including military force. Peace enforcement operations will often involve fighting against regular or irregular forces, meaning that the participating states engage in armed conflict. Nevertheless, the question of whether peace support forces are participating in an armed conflict will depend on the actual situation rather than the label given to the operation or the type of mandate under which the forces operate. If the situation in the area qualifies as an international or non-international armed conflict and the international forces in fact take part in this armed conflict, they will have to follow the law of armed conflict.<sup>26</sup> In such cases, the international forces may also qualify as lawful targets under the law of armed conflict.

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<sup>26</sup> UN Secretary-General's bulletin on the observance by United Nations forces of international humanitarian law, 1999.

- 1.49 International forces participating in a peace operation will be party to an international armed conflict if they employ armed force against another state in a manner constituting actual participation in hostilities.
- 1.50 International forces participating in a peace operation will be party to a non-international armed conflict if the following three conditions are met:
- a non-international armed conflict is already in progress in the area
  - the international forces actively support one party to the conflict
  - this support is of a type that constitutes actual participation in combat activity
- 1.51 If there is no ongoing armed conflict or the forces are not participating in an armed conflict, the peacekeeping force shall be regarded as civilian in nature, and will thus normally be permitted to use force only in self-defence.

## **The relationship between the law of armed conflict and human rights law**

- 1.52 Human rights law regulate the state's use of force against its own citizens and others located in its territory or under its control. Human rights assign rights to persons and responsibilities to the state and those acting on behalf of the state, such as the police and armed forces. Human rights can be divided into two categories: negative and positive rights. Negative human rights are designed to protect individuals against intrusion by the state, whereas positive rights require actions by states for the benefit of their inhabitants with respect to matters such as development, fair pay, social benefits and health care. In principle, only states can be held accountable for human rights violations, while the law of armed conflict, by contrast, imposes obligations on states and individuals alike. Norway therefore has a human rights responsibility to persons in Norway and to persons under Norwegian control in other countries. This will also be the case if Norwegian forces were participating in an armed conflict. Negative rights in particular might then come to the fore. An example would be if Norwegian forces were to establish an internment camp. Norway will have a human rights responsibility for persons interned there.



*The NATO flag waving over a Norwegian Sisu armoured vehicle in the village of Plementina, Kosovo, in September 1999. KFOR, which was established pursuant to UN Security Council Resolution 1244, is an example of a peace enforcement operation. Photo: Thomas Moss/Norwegian Armed Forces Media Centre.*

- 1.53 In practice, most of the human rights which Norway is obliged to safeguard and which are relevant to military operations are also incorporated into the law of armed conflict. Accordingly, as long as Norwegian forces comply with the law of armed conflict and the guidance given for individual operations, they will not violate Norway's human rights obligations. For example, mistreatment of prisoners is prohibited by both the law of armed conflict and international human rights law. This manual therefore does not treat human rights as a separate topic.
- 1.54 In some cases, the law of armed conflict and human rights law will impose different requirements. Since human rights are primarily drafted for peacetime, some of the rules are not practicable during armed conflict. For example, the European Convention on Human Rights does not permit security detention, although the law of armed conflict unquestionably permits it.<sup>27</sup> In such cases, the rules of the law of armed conflict will apply because they were developed specifically for application during armed conflict (the *lex specialis* principle: special rules take precedence over more general rules). The relationship

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<sup>27</sup> The European Convention on Human Rights of 4 November 1950 (ECHR), Article 5.



between the law of armed conflict and human rights law is evolving. Norwegian forces must therefore refer to national guidelines issued for each specific operation.

## **The relationship between the law of armed conflict and the right of individual self-defence**

- 1.55 In armed conflicts, there are two grounds on which military forces may employ force: the right to engage in lawful acts of war and the right of individual self-defence. Both the right to engage in lawful acts of war and the right of individual self-defence render otherwise unlawful actions lawful, and thus not punishable.
- 1.56 A lawful act of war is an action which is taken during an armed conflict by a person permitted to participate in hostilities (see more, chapter 3), and which is based on the necessities of war with a military purpose and not private in nature. In addition, the act must comply with the law of armed conflict as applicable. The right to engage in lawful acts of war is the most important basis for using force during armed conflict. An example of a lawful act of war is injuring or killing another combatant. The role of lawful acts of war as a ground for excluding criminal responsibility is discussed further in sections 14.44–46.
- 1.57 The right of individual self-defence makes it permissible to use force to stop an ongoing or imminent unlawful attack.<sup>28</sup> Permitted use of force is limited to necessary and proportionate acts. In other words, the act of self-defence may not clearly exceed what is necessary to avert an attack, the degree of force which may be deemed appropriate in view of how dangerous the attack is, the interests violated by the attack, and the guilt of the attacker. The scope of injury caused by the act of self-defence is also relevant in this context. The right of individual self-defence is a basic right held by all persons irrespective of where they are located, although the content of the right may vary. The operational mandate, political guidelines and operational considerations may, for example, restrict the right of Norwegian personnel to act in self-defence against third parties or material assets (so-called extended self-defence). The right to act in individual self-defence cannot be restricted. Once an attacker has been incapacitated or an attack has otherwise been stopped, the act of self-defence must also cease.

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<sup>28</sup> *General Civil Penal Code (1902), section 48 and (2005), section 18.*

- 1.58 Fewer restrictions apply to the use of force in the conduct of lawful acts of war than to the right of self-defence, with respect to both when and how much force may be used. Lawful acts of war may be either offensive or defensive,<sup>29</sup> and may be carried out irrespective of the actions taken by the enemy. In other words, there is no requirement for a prior attack in order to be able to use force against a combatant, since the law of armed conflict permits attacks on lawful targets. The use of force in self-defence, however, must be an act performed to avert an ongoing or imminent unlawful attack, and must be proportionate to the threat presented by the attack. No such requirement applies in the case of lawful acts of war.
- 1.59 Further, as stated above, a condition of the right of self-defence is that it is directed against an unlawful attack. The law of armed conflict permits attacks on combatants provided that such attacks are carried out by persons who are lawful combatants. This means that such attacks are not unlawful. The use of force in response to an attack by a lawful combatant is therefore governed by the law of armed conflict, rather than the right of self-defence, provided that the enemy is a lawful target. In other words, the right of self-defence has limited application to soldiers participating in an armed conflict. On the other hand, those soldiers will have greater scope for action in terms of using armed force under the law of armed conflict. The situation would be different if the person being attacked is, for example, a medical orderly. Medical orderlies are not lawful targets, and attacks on them are therefore unlawful. Medical orderlies are therefore permitted to use force in self-defence to avert an attack. Medical personnel may also, as a rule, act in self-defence on behalf of other medical personnel, sick and injured persons, and medical units.
- 1.60 Self-defence will primarily be relevant to Norwegian forces participating in an armed conflict in the following situations:
- The forces have been given a law-enforcement assignment, such as riot control or the manning of a roadblock, and have no authority to use force except in self-defence; or
  - Military personnel believe that they are under attack, or that someone is about to attack, but it is unclear whether the attacker or attackers have a direct connection with the armed conflict. For example, a person may appear intoxicated, there may be instances of criminal conduct, or persons in civilian clothing may be demonstrating against the loss of family members. Although such persons will not be lawful targets, necessary and proportionate force may be used in self-defence to stop the attack.

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<sup>29</sup> *Additional Protocol I, Article 49(1).*

The role of lawful acts of war and self-defence as grounds for exemption from criminal responsibility is discussed further in sections 14.44–46 and 14.48–54.

## **The relationship between the law of armed conflict and rules of engagement (ROE)**

- 1.61 Rules of engagement (ROE) are a command and control instrument. The ROE have three primary functions: they give military commanders control over the performance of an assignment, they ensure political control over military use of force, and they ensure that assignments are carried out in accordance with applicable national and international legal frameworks. The law of armed conflict is a key element in the drafting, interpretation and application of rules of engagement.
- 1.62 The law of armed conflict's effect on the planning and conduct of operations, particularly through rules of engagement, is discussed in greater detail in chapter 15: "Rules of engagement".



## 2

# Targeting. UHWUbXdfYWhcbglb UHW

### Introduction

- 2.1 The law of armed conflict sets out the legal framework for target selection and the conduct of attacks. It defines which targets are lawful to attack, which means and methods may be used, the scale of acceptable civilian losses and the precautions that must be taken to avoid or at least minimize civilian losses.

#### PRECAUTIONS IN ATTACK

1. In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects.
2. With respect to attacks, the following precautions shall be taken:
  - a) Those who plan or decide upon an attack shall:
    - (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
    - (ii) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects;
    - (iii) refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;
  - b) An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
  - c) Effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.

Additional Protocol I, Article 57.1–3.

This chapter discusses the general rules on target selection under international law. More detailed rules regarding who and what constitutes a lawful target, who and what is protected and when and how they must be protected are dealt with in subsequent chapters. These rules represent the outer boundaries governing acceptable actions. Military operations may also be limited by political and military considerations. Such restrictions may, for example, include provisions specifying that certain targets which are lawful targets under the law of armed conflict may nevertheless not be attacked without special approval. These types of restrictions will be set out in operational plans, orders and directives, particularly the rules of engagement for a given operation.

## Definition of attack

- 2.2 The law of armed conflict operates with a broad definition of “attack”. The term is defined to mean any act of violence directed at an opposing party, whether offensive or defensive.<sup>1</sup> An act of violence is defined as an act that causes death or injury to a person or that damages or destroys an object. The act of violence need not be kinetic, although this will generally be the case in a typical military act of violence, such as when a grenade is fired at an enemy combat vehicle. Provided that the expected consequence of an act is in fact death or injury to a person or damage to or destruction of an object, the act constitutes an attack. Examples of non-kinetic acts that may constitute an attack include cyberattacks and the opening of a dam to release the retained water. Acts that are merely inconvenient to the civilian population are not regarded as attacks. For example, influencing civilian quality of life by reducing access to TV, the internet or a varied selection of food (without damaging or destroying civilian objects) is not regarded as an attack on the civilian population as long as the measures taken do not threaten the civilian population’s survival.

## Protection of civilians and civilian objects

- 2.3 Only persons and objects that are lawful targets (see chapters 3 and 7) may be objects of attack. Civilians and civilian objects shall never be the object of attack.<sup>2</sup> All practical precautions must be taken to avoid incidental civilian damage, injury or loss of life. Any incidental loss of civilians or civilian objects must be avoided whenever possible, and must in any event be proportionate to the military advantage anticipated.<sup>3</sup> These are the principles of distinction and proportionality and the requirement to take precautions to reduce incidental civilian damage, injury or loss (see definitions of the principles in chapter 1, application of the proportionality principle in sections 2.19–25, and the discussion of precautions in 2.26–43).

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<sup>1</sup> *Additional Protocol I, Article 49(1).*

<sup>2</sup> *Additional Protocol I, Articles 51(2) and 52(1).*

<sup>3</sup> *Additional Protocol I, Article 51(5)(b).*

- 2.4 Certain persons and objects enjoy special protection, such as medical personnel, ambulances and churches. The rules on special protection are discussed in chapter 4: “Protection and protected persons”; chapter 5: “Medical services and the protection of sick, injured, shipwrecked and dead persons”; and chapter 7: “Objects that are lawful targets, and protected objects”. Special protection status means that damage/injury to or destruction or loss of such persons or objects will only be deemed proportionate if the military advantage anticipated is sufficiently great.

## **Doubt about whether something or someone is a lawful target**

- 2.5 Persons and objects to be attacked must first be identified as lawful targets.<sup>4</sup> If there is doubt about whether a person is a civilian or a member of the armed forces, the person shall be regarded as a civilian.<sup>5</sup> In the event of doubt about whether an object normally dedicated to civilian purposes, such as a church, a house or a school, is being used to make an effective contribution to military action, it is to be presumed that the object is not being used in this way.<sup>6</sup> However, this does not mean that any doubt will render an attack unlawful, since this would be an impossible requirement in most cases. Due to the confusing circumstances of armed conflict (the fog of war), military forces often have to deal with doubts when deciding whether someone or something is a lawful target. The law of armed conflict requires those who plan and conduct operations to take all feasible precautions to ensure that the objective is lawful. “Feasible precautions” are defined in section 2.6. If doubt remains after all feasible precautions have been taken to clarify whether an objective is lawful, the degree of doubt will have to be weighed up against the consequences of not attacking. In other words, those who plan and conduct an attack must decide how important it is to carry out the attack. Irrespective of the importance of an objective, an attack may only be carried out if it is more likely than not that a person or object is a lawful target. If it subsequently becomes clear that the target was not a lawful target after all, the attack must be cancelled or suspended.<sup>7</sup>

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<sup>4</sup> *Additional Protocol I, Article 57(2)(a)(i).*

<sup>5</sup> *Additional Protocol I, Article 50(1).*

<sup>6</sup> *Additional Protocol I, Article 52(3).*

<sup>7</sup> *Additional Protocol I, Article 57(2)(b).*

- 2.6 “Feasible precautions” are those which are practical and workable given the circumstances, including both humanitarian and military considerations.<sup>8</sup> Military personnel will not be judged against an ideal standard when making decisions, but their decisions must nevertheless appear reasonable and sensible based on what could be expected at the time of the decision. All feasible precautions must be taken to verify that a potential target is lawful before making the decision to attack. When assessing whether enough has been done to identify a target, account will be taken of such factors as the information that was or should have been available at the relevant time, tactical and operational considerations, available means, and the need to protect one’s own forces. Account must also be taken of the fact that such decisions are normally made under difficult and confusing circumstances.
- 2.7 The plans, orders and operational directives of different operations may pose different requirements, such as the number and types of informational sources or sensors that contribute to such identification. These requirements may also be amended as the operation develops. As a rule, intelligence will constitute an important basis for assessing whether something or someone is a lawful target.

### *Attacks against persons*

- 2.8 The question of which persons constitute lawful targets is dealt with in chapter 3. When a person is to be attacked, he or she must first be identified as a lawful target. In the case of pre-planned operations, this will entail locating the right person. After a person is identified and located, the information should be kept updated until the attack is carried out, so that it remains clear that the target of the attack is a lawful target. If, for example, a person is lost from sight or doubt otherwise arises about the person’s location, the person must be re-identified. Although continual visual contact with the target is the best way of ensuring that a person is a lawful target, this is not a requirement of international law.
- 2.9 In conflicts where one party does not distinguish itself from civilians through the wearing of uniforms or similar means, a thorough understanding of the society, culture and area of operation will be useful in identifying lawful targets. For example, in some parts of the world, carrying arms is common, and this by itself is not to be regarded as indicating that a person is a lawful target.

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<sup>8</sup> See for example Revised Protocol II (revised 3 May 1996) to the CCW, Article 3(10).



- 2.10 Good situational awareness will also be important in operations in which it is not feasible to identify individuals, but where it is possible to identify military teams or units. To be able to carry out an attack, it is important to know the likelihood that protected persons are not present.



*The picture shows a reinforced aircraft hangar at an airfield in Libya that was bombed by Norwegian F-16 fighters during operation “Odyssey Dawn”. The aircraft hangar was deemed a lawful target, and a precision-guided bomb was delivered to the centre of the target. Photo: Norwegian Armed Forces/Norwegian Armed Forces Media Centre.*

- 2.11 Persons who have previously been lawful targets but who are sick, injured or captured (*hors de combat*) will no longer be lawful targets unless they choose to continue fighting.
- 2.12 The categories of persons who are lawful targets in a specific conflict will generally be reiterated and emphasised in the rules of engagement and operational plans, orders and directives.

### ***Attacks against objects***

- 2.13 Attacks against objects must be limited to objects that qualify as lawful targets.<sup>9</sup> Objects which are lawful targets are also referred to as “military objectives”. Which objects constitute lawful targets, and how the conditions are applied, is discussed further in chapter 7. Objects which are lawful targets can generally be divided into two categories.

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<sup>9</sup> *Additional Protocol I, Article 52.*

- 2.14 The first category comprises objects which by their nature make an effective contribution to military action, such as military vehicles, armouries and military ports. The destruction of such objects will normally secure a definite military advantage by weakening the enemy's military capacity. Given that the objects are purely military in nature, their destruction will not entail a civilian loss. However, consideration must be given to whether such destruction may cause injury or damage to civilians or civilian objects in the surrounding area; see sections 2.27–31.
- 2.15 The second category encompasses objects which are lawful targets due to their location, purpose or use. The object in question must have a location or use or planned use (“purpose”) such that its destruction will, in the prevailing circumstances, offer a military advantage. Accordingly, to attack such an object, considerably more information is required than in the case of more obvious military objectives. Objects in this category may also be important to an area's civilian population, a fact that must be given consideration so that incidental civilian damage, injury or loss can be avoided or at least reduced.

## Indiscriminate attack

- 2.16 Attacks that do not distinguish between military objectives and protected objects or person, or that cause disproportionate civilian losses, are described as “indiscriminate attacks”. Such attacks are prohibited because they conflict with both the principles of distinction and proportionality. There are two categories of indiscriminate attack: 1) attacks using means of warfare (weapons) and methods that are indiscriminate, and 2) indiscriminate attacks employing otherwise lawful weapons. Means and methods which are indiscriminate by nature (inherently indiscriminate) are prohibited.<sup>10</sup> These are therefore discussed together with prohibited means and methods in chapters 8 and 9.

### *Indiscriminate attacks employing otherwise lawful weapons* *Attacks which are not directed at a specific lawful target*

- 2.17 Attacks not directed at a specific military objective are indiscriminate and prohibited.<sup>11</sup> Accordingly, all attacks must be directed at specific military objectives and not, for example, at a general area. An example of an indiscriminate attack is directing automatic fire into an area when it is unclear whether the area contains civilians. Since this entails causing destruction and damage/injury without the attack being focused on a military objective, it would be prohibited.

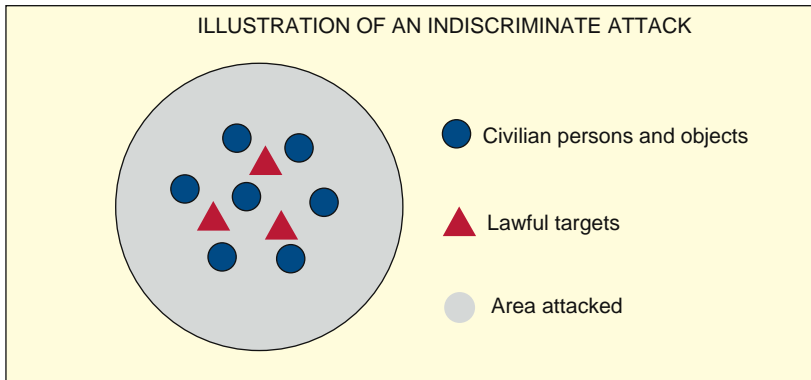
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<sup>10</sup> Additional Protocol I, Article 51(4)(b) and (c).

<sup>11</sup> Additional Protocol I, Article 51(4)(a).

### Attacks which treat several dispersed targets as a single target

- 2.18 An attack will also be considered indiscriminate if several clearly separated and distinct military objectives located in a city, town or other area containing a similar concentration of civilians or civilian objects are treated as a single military objective.<sup>12</sup> Instead, the different military objectives must be attacked individually so as to protect civilians and civilian objects in the area.



## Proportionality

- 2.19 Injury/damage to civilians or civilian objects shall be avoided wherever possible. Various precautions must therefore be taken to protect civilians; see section 2.26 onwards. However, the law of armed conflict does accept civilian losses if there is proportionality between the expected concrete and direct military advantage on the one hand and avoidable incidental civilian losses caused by the attack on the other.<sup>13</sup> The terms “civilian losses” and “incidental damage” are used to describe the loss of civilian life, injury to civilians, damage to civilian objects or a combination of these things. Although proportionate losses are not prohibited under international law, in some conflicts there may be a policy of not accepting any expected civilian losses.

<sup>12</sup> *Additional Protocol I, Article 51(5)(a).*

<sup>13</sup> *Additional Protocol I, Article 51(5)(b) and 57(2)(a)(iii).*

- 2.20 Only disproportionate civilian losses are prohibited, not extensive military losses. If it is clear that civilians or civilian objects will not be injured or damaged by an attack, no proportionality assessment will be necessary. On the other hand, it is always necessary to assess whether an attack is unlawful if the attack may cause unnecessary suffering or superfluous injury to combatants. All persons are entitled to such protection, including those who are combatants or sick, injured, captured or otherwise *hors de combat*, i.e. no longer participating in hostilities.<sup>14</sup> Compliance with the prohibition against causing unnecessary suffering or superfluous injury is a question of the choice of means and methods of warfare, rather than part of the proportionality assessment. In other words, although it is lawful to kill combatants, they may not be exposed to unnecessary suffering. It is therefore prohibited, for example, to use blinding laser weapons, weapons with non-detectable fragments and explosive projectiles (see further discussion of prohibited means of warfare in chapter 8).
- 2.21 Further, only losses, injuries or damage of a certain impact have to be weighed against the military advantage. These must either entail the loss of life or injury to civilians, or damage to or destruction of civilian objects. As stated in connection with the definition of attack, collateral damage does not include inconvenience to the civilian population. For example, a reduced selection of food is not to be deemed loss or damage, whereas a lack of access to food in general would be damage that must be incorporated into the proportionality assessment.
- 2.22 Attacks on objects used for both civilian and military purposes (dual-use objects) will always cause harm to civilian interests. However, this does not mean that every attack on such objects is prohibited. Since an attack on such an object will always lead to civilian loss, a proportionality assessment must be carried out to ensure that the expected military advantage outweighs the expected civilian loss. This assessment presupposes, among other things, knowledge of the means and methods which may potentially be used during the attack. For example, it may be sufficient to destroy the road leading up to a bridge to hinder the enemy from using it, rather than to destroy the whole bridge. The road can be repaired quite quickly, whereas a bridge would take far longer to replace. Such attacks will often be regulated separately in specific operational plans, orders or directives.

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<sup>14</sup> *Additional Protocol I, Article 35(2)*.

- 2.23 The military advantage one expects to obtain may include not only the immediate benefit from the attack but also the cumulative benefit to the overall operation of which the attack is a part. Protection of one's own forces may also constitute a military advantage, although some risk of loss to one's own forces must be accepted if necessary to avoid disproportionate incidental damage, injury or loss. For example there is no prohibition against relying exclusively on air forces to conduct an operation, although doing so may render it impossible to destroy all targets in a lawful manner. If an aerial attack on a particular target would entail disproportionately large civilian losses, the attack must either be conducted in a different manner – using ground forces, for example – or not be carried out.
- 2.24 Primary responsibility for making a proportionality assessment will generally lie at the level of command, which has the best basis for assessing both the expected military advantage of the attack and the risk of incidental civilian damage, injury or loss. Such an assessment requires, among other things, an effective overview of both the situation and the operation of which the attack forms a part. If such an assessment has been conducted with respect to an attack, personnel of lower rank will primarily be responsible for suspending or cancelling the attack if the situation changes or proves to be other than planned. Such personnel will also have a duty not to follow orders to carry out an attack if they realise that the planned attack is manifestly unlawful, for example because a building proves to be a civilian building rather than a weapons cache, or because they have received orders to direct the attack at protected civilians.
- 2.25 In the case of dynamic attacks (see section 2.39), those in charge of the situation will also have a responsibility to evaluate the lawfulness of their own actions, including whether the use of force would be proportionate. This is because those on site will often have the best overview of the situation. If a patrol on its way to conduct an operation is attacked by a person who is positioned among civilians, the patrol itself will have to assess how much risk the civilian population may be exposed to before the use of force would cause excessive civilian losses or injury, taking into account the degree of danger represented by the attack on the patrol.

## Precautions in attack

- 2.26 As stated above, Norwegian forces always have a duty to seek to spare civilians and civilian objects during the conduct of military operations.<sup>15</sup> This section describes feasible precautions that must be taken to avoid unlawful attacks.

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<sup>15</sup> *Additional Protocol I, Article 57(1)*.

### *Risk of injury or damage to civilians or civilian objects*

- 2.27 Those who plan or decide upon attacks must take all “feasible precautions” to avoid or minimize the risk of civilian losses; see section 2.6.<sup>16</sup> What is feasible will depend on the situation and the available time and information. First and foremost, the requirement means that an evaluation must be conducted before every attack, examining whether there are civilians or objects in the area that may be expected to suffer damage from the particular weapons to be employed, i.e. in the collateral hazard area. “Collateral Hazard Area” means the area around the target which is within the weapon’s defined impact area or which is otherwise anticipated to be affected by blast, fragmentation or debris caused by employment of an explosive weapon, for example because the attack is expected to cause a large explosion (see section 2.34 on challenges relating to the indirect effects of attacks). If there is a risk of incidental civilian damage, injury or loss, consideration must be given to whether the attack can be carried out in a manner that reduces the risk of injury or damage to civilians or civilian objects, or whether the attack can be conducted at a different point in time. For example, it may be possible to request precision-guided munition (PGM) or to change or adapt the type of weapon to be used, so as to reduce the potential damage or radius of damage. One potential measure may be to employ a delayed fuse. If circumstances change during the attack and those conducting the attack become aware of the change, consideration must be given to whether it remains lawful to carry through the attack or whether, for example, there are too many civilians present, as may be the case if civilians or unidentified persons move into the danger zone. If it becomes apparent that the attack would cause disproportionate injury to civilians, it must be cancelled or suspended. The crucial point is whether the decision appears correct and reasonable based on the expected consequences.
- 2.28 To reduce the risk of civilian losses, those who plan or conduct an attack must have the best possible understanding of the situation in the area of attack. Thorough situational awareness is a fundamental prerequisite for all sound military decisions. For example, it is important to know the *modus operandi* of the enemy and how combatants dress, as well as whether it is normal for civilians to wear pieces of military uniforms. In addition, in many cases it will be vital to have good knowledge of the specific target area. Such knowledge can be acquired by surveying the area over time to gain an understanding of

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<sup>16</sup> *Additional Protocol I, Article 57(2)(a)(iii).*

the pattern of life of combatants and civilians in the target area. Both general situational awareness and knowledge of the specific target area will make it easier to plan and conduct operations so as to reduce the risk of civilian losses. Such awareness will also make it possible to notice deviations from the normal pattern which may constitute a threat.

2.29 Examples of factors which will be relevant in understanding a target area:

- Are there civilians or civilian objects in the area that may be injured or damaged by the attack?
- Is the building occupied by civilians?
- Are civilians normally present in the area at this time of day?
- Do civilians tend to congregate in certain areas at fixed times? Is there a regular market day, for example?
- Does the person who is to be attacked travel alone or with other combatants?
- Have civilians been observed entering the area who have not yet left?
- Is the vehicle in question also used by civilians, or only combatants?
- Are there works and installations containing dangerous forces (dams, dykes and nuclear electrical generating stations) in the target area, that may be released by an attack?

2.30 When it is possible to choose between several military objectives that would achieve the similar military advantage, the objective expected to cause the least incidental damage, injury or loss shall be chosen.<sup>17</sup>

**COMMON CAUSES OF INCIDENTAL CIVILIAN DAMAGE, INJURY OR LOSS**

Incidental civilian damage, injury or loss is generally caused by:

- insufficient knowledge about the target
- insufficient general situational awareness
- incorrect interpretation of the specific situation
- insufficient ability or opportunity to adjust the use of force/means of attack
- insufficient ability or opportunity to ensure that the weapon hits the target

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<sup>17</sup> *Additional Protocol I, Article 57(3).*

### *Choice of means and methods*

- 2.31 In most cases, the choice of means and methods will affect the risk of incidental civilian damage, injury or loss. When planning and conducting attacks, the choice of means and methods must therefore be assessed with the aim of avoiding, or at least minimizing, incidental civilian losses.<sup>18</sup> There is no requirement for precision-guided munitions always to be used when there is a risk of injury to civilians, but there will be cases in which the use of such weapons will be the only way to reduce the risk of incidental civilian damage, injury or loss enough to allow the attack to be conducted in a lawful manner.



*Examples of direct and indirect fire: a soldier with an HK416 and a Bofors VS Caesar 155 mm self-propelled artillery system. Photo 1: Torgeir Hangaard/Norwegian Armed Forces Media Centre, 2: Marius Pettersen/Defence Forum/Norwegian Armed Forces Media Centre.*

- 2.32 Attacks can be carried out using direct or indirect fire. Fire is direct if both the sensor and effector, meaning the person or device that identifies the target and the one that “pulls the trigger” are located on the same platform where the final decision to fire is taken. This is the case when a tank shoots at a target or a soldier fires a rifle. Fire is indirect when the sensor, effector and decision-maker are in different locations, or when a direct-fire platform supports someone without direct sight of the target. For example, an artillery unit will not have direct sight of the target at which it is shooting. A pilot who sees his target on the ground delivers direct fire; but for the ground force receiving support and unable to see the target, the engagement is one of indirect fire. Other sources of indirect fire include mortars, guided missiles, armed drones and field artillery. The use of indirect fire will in many cases increase the risk of unintended damage due to the increased geographical distance between the

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<sup>18</sup> *Additional Protocol I, Article 57(2)(a)(ii).*



attacker and the target, and because some time may elapse from when the assessments are done and the weapon is fired until the target area is struck. This must be incorporated into the assessment of whether the attack is permitted.

- 2.33 As well as assessing what weapons are available and may be used, factors influencing the effect of the weapon must also be considered. These may include the terrain in the target area, weather conditions and the timing of the attack. For example, the effect of a weapon may differ depending on whether it hits asphalt or sand.

### *Challenges relating to the indirect effects of attacks*

- 2.34 A weapon or methods used in an attack may have both direct and indirect effects. For example, a rocket attack on an ammunition dump may trigger secondary explosions that cause destruction in a wider area than a rocket explosion alone would have done. In addition, certain types of weapons and ammunition may cause longer-term incidental damage, injury or loss, such as through unexploded munitions that continue to present a risk to the civilian population long after the conflict or hostilities have ended. Similarly, the destruction of a power plant supplying military headquarters with electricity may also cut the electricity supply to a civilian hospital, with potentially fatal consequences. If such indirect effects are known or should have been known, and are thus predictable, they must be regarded as foreseeable. In such cases, they must be incorporated into the assessment of whether the attack should be carried out or whether it would cause disproportionate civilian losses.

### *Requirement to cancel or suspend a planned attack*

- 2.35 An attack shall be cancelled or postponed if it becomes obvious that:
- the target is not a lawful target
  - the target is subject to special protection, or
  - the attack may be expected to cause disproportionate loss of civilian life, injury to civilians, or damage to or destruction of civilian objects.<sup>19</sup>

### *Advance warning*

- 2.36 Those who plan or conduct attacks shall, if the circumstances permit, give effective advance warning of attacks that may cause injury to civilians or the loss of civilian lives.<sup>20</sup> The purpose of advance warning is to allow civilians to flee or seek cover prior to the attack.

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<sup>19</sup> *Additional Protocol I, Article 57(2)(b).*

<sup>20</sup> *Additional Protocol I, Article 57(2)(c).*

- 2.37 In cases where advance warning is possible, it must be given in such a way as to reach those who may be affected and to give civilians a genuine opportunity to avoid injury. However, providing a warning will not exempt the attacking party from other obligations if it is impossible for the civilians to evacuate the area.
- 2.38 There is no requirement to give advance warning if circumstances do not permit it – if one's own forces would be exposed to unnecessary risk, for example, or if surprise is vital to achieving the objective of the operation. The method of advance warning must therefore be adapted to the situation at hand, both with regard to the specificity and timing of the warning and the way in which it is given.

#### HISTORICAL EXAMPLES OF ADVANCE WARNING

- On 19 May 1944, the employment office at Akersgata 55 in Oslo was blown up by the “Oslo Gang” resistance group to prevent Norwegian men from being registered for mandatory labour for the occupying power. After the explosives were placed, warnings were given that everybody had to evacuate the building.
- Coalition forces dropped large numbers of flyers over Iraq in 2002–2003. Some of the flyers warned civilians that military targets would be attacked and that civilians should keep away from them. Pictures were used to show what constituted a military target.
- During Israel's Cast Lead operation in Gaza in 2009, the Israelis telephoned Palestinians at home to warn that the area where they lived would be attacked, and to tell them to evacuate.

### *Pre-planned and dynamic targeting*

- 2.39 In practice, a distinction will be made between dynamic and pre-planned use of force. The duty to take all feasible precautions to avoid or reduce incidental civilian loss is the same, but the assessment will differ. Dynamic use of force against persons will be relevant in response to an attack or other threatening action, or against objects that suddenly appear and have to be neutralised immediately. Pre-planned use of force will often be employed against persons or objects that do not represent a threat at the time of the attack, but which are nevertheless approved lawful targets due to their function or expected future actions or use.
- 2.40 Attacks on pre-planned objectives must be planned so as to reduce the risk of collateral damage as much as possible. A thorough target selection process is

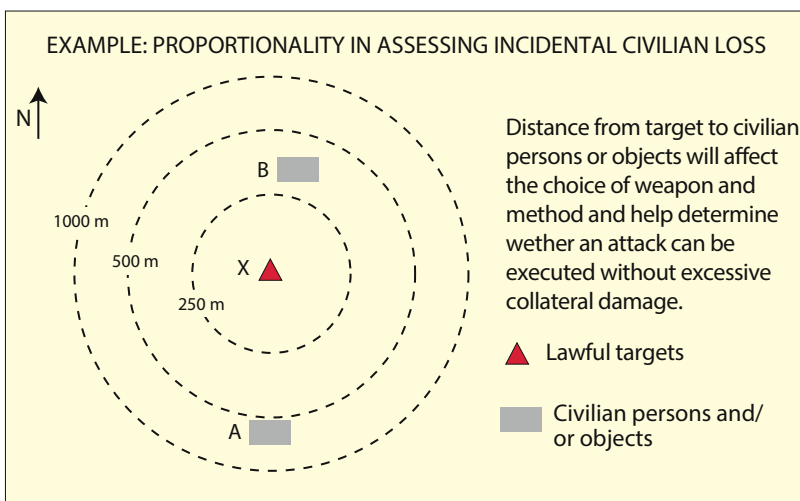
often possible in the case of planned attacks. This process requires the person planning an attack to collect and evaluate available information that may influence the assessment of whether the proposed target may be attacked. This will include, among other things, an assessment of whether there are civilians or civilian objects near the target that may suffer injury or damage in connection with an attack. Information may be obtained from various sources, including intelligence collection, reconnaissance, surveillance, etc. Based on the information about the target and surrounding area, those who are planning an attack may have to issue guidance on appropriate means or methods to reduce the risk of incidental civilian damage, injury or loss. The evaluation will also give guidance on when the attack should be conducted and whether any civilians should be warned beforehand. Pre-planning of attacks will often follow standard operating procedure, specifying such matters as the different authorisation levels required for approval of attacks expected to cause incidental civilian damage, injury or loss. During execution of such an attack, the person or object to be attacked must be identified as the one pre-approved as a lawful target.

- 2.41 In the case of pre-planned attacks, lists of approved targets are generally prepared. Such lists must be updated continuously to incorporate new information and changed circumstances. The way an object is used may change from one day to another, for instance, making it no longer a military objective.
- 2.42 When an attack is not pre-planned, either because the situation demands immediate action or because a lawful target suddenly becomes available, there will be less time to take precautions. However, formal procedures will still have to be followed. In principle, these will not differ from pre-planned procedures, although they will allow for the need to conduct evaluations on short notice. It will still be necessary, among other things, to take feasible precautions to ensure that the target is lawful and to reduce the risk of collateral damage. The question of what is feasible in such cases must be considered on the basis of the threat faced, the available equipment and the time available to assess the situation. This is discussed in detail in section 2.6.
- 2.43 Some instances of the dynamic use of force against persons may entail the use of force in self-defence – for example, if it is unclear whether the person presenting a threat is a lawful target (see chapter 3). In such cases, the use of force must be limited to what is necessary and proportionate to stop or avert the attack, and force may only be directed at the person presenting a threat. In other words, self-defence offers less scope for action than engagement in lawful acts of war, with more limitations applying to the form and degree of force used. Collateral damage, for example, is less acceptable when force is used in self-defence than when force is directed against lawful targets

according to the law of armed conflict. The relationship between the right of personal self-defence and lawful acts of war is covered in sections 1.55–60, while the right of self-defence as a ground for exemption from criminal responsibility is considered in sections 14.47–53.

## Illustration: Conduct of attack and application of the law of armed conflict

- 2.44 An attack is planned on target X, whether as part of a pre-planned operation or because the need to do so has arisen on short notice. Target X is a depot for military communications equipment, and constitutes a lawful target. Two civilian buildings – A and B – are located nearby, standing respectively 800 metres and 400 metres from X (see sketch below for the locations of the different objects). The situation in the area precludes the deployment of ground forces to carry out the attack.



### a. Scenario 1

Building A is a home where women and children are present at all times, while building B is an unused outhouse. There are no other civilian objects within a radius of 500 metres. No civilians have been observed in or around the military depot. In this case, the risk of incidental civilian damage, injury or loss will be low provided that the weapon or method employed is not expected to cause damage or injury beyond 500 metres from the target.

### b. Scenario 2

The same as above, but building B is now a civilian dwelling. The risk of injury to civilians has increased, and it will be necessary to consider whether

precision-guided munitions should be used (assuming that they are available to the attacker). If long-range munitions are in fact to be deployed, thought should be also given to delivering them on an east-west bearing – rather than north-south – to reduce the risk of hitting buildings A and B.

### c. Scenario 3

Buildings A and B are both civilian dwellings, and civilians have been observed in the vicinity of the depot. This will make it difficult to conduct an attack without causing injury to civilians or damage to civilian objects. In such cases, consideration must be given to whether attacking the target would secure such a substantial military advantage that it outweighs, i.e. is proportionate to, the expected civilian damage or injury. The same must be done if an unknown person unexpectedly enters the area, unless the person can be identified as a lawful target.

## Protection of one's own civilian population against the effects of an attack

- 2.45 In addition to taking precautions when planning and carrying out attacks, a party to a conflict must take all feasible precautions to limit the effects of attacks on areas under its control.<sup>21</sup> For discussion of the term “feasible precautions”, see section 2.6. Protection of civilians is addressed in greater detail in chapter 4.
- 2.46 Civilians and civilian objects under the control of a conflict party must, wherever feasible, be relocated away from areas close to lawful targets. Such evacuations may only be done for the safety of the civilians.<sup>22</sup> In occupied territory, no forced evacuation or deportation of civilians from an area is permitted except when safety concerns for the population or imperative military reasons so demand (see sections 9.38–39 and 13.30–31).<sup>23</sup>
- 2.47 To limit the effects of an attack, lawful targets shall not be placed within or in the vicinity of densely populated areas.<sup>24</sup> If this precaution is not taken in peacetime, there must be a plan to relocate potential lawful targets or evacuate the civilian population in the event of an armed conflict in the territory. This issue is discussed further in chapter 9 on methods of warfare; see section 9.31

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<sup>21</sup> *Additional Protocol I, Article 58.*

<sup>22</sup> *Additional Protocol I, Article 58(a).*

<sup>23</sup> *Geneva Convention IV, Article 49, Additional Protocol II, Article 17.*

<sup>24</sup> *Additional Protocol I, Article 58(b).*

onwards. Other relevant precautions must also be taken to protect civilians and civilian objects against the risks inherent in military operations.

- 2.48 Civilians shall not be used to shield or hide lawful targets. Even if one party exploits civilians in this manner, the attacking forces are not exempt from their duty to spare civilians and reduce collateral damage.<sup>25</sup> However, civilian losses will be difficult to avoid in practice, meaning that an attack will be lawful as long as the expected military advantage outweighs the civilian losses. Civilians who voluntarily act as shields may become lawful targets and thus lose their protected status; see the example in box 3 in chapter 3.

#### SUMMARY

This list does not set out an alternative to the duties described above. Rather, it is intended as a checklist of topics that require assessment. Mission-specific orders and rules of engagement come in addition.

1. Locate and observe the potential target and surrounding area.
2. Assess whether the target (person or object) is a lawful target and thus not subject to special protection.
3. Assess whether there is a risk of incidental civilian damage, injury or loss, and take all feasible precautions to reduce such effects to a minimum.
4. Consider which weapons and methods will be most appropriate to avoid civilian losses.
5. Consider whether any unavoidable collateral damage will be proportionate (i.e. not excessive) to the expected military advantage to be achieved through the attack.
6. While carrying out the attack, take all feasible precautions to ensure that the weapon hits the target.
7. Cancel or suspend the attack if it becomes clear that any of the determinations made in points 2–6 are no longer valid.

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<sup>25</sup> *Additional Protocol I, Article 51(8).*

# 3

## Persons who are lawful targets

### Introduction

- 3.1 This chapter provides an overview of the different categories of persons who may be lawful targets during an armed conflict, and the criteria for being a lawful combatant. The status to be given to different categories of persons in the event of capture is discussed in chapter 6. Chapter 4 takes a closer look at the definition of civilians and different groups' entitlement to protection.
- 3.2 The law of armed conflict distinguishes between combatants and civilians. Combatants in turn are divided into two categories: 1) combatants entitled to participate in hostilities<sup>1</sup> ("lawful combatants" or "combatants"), and 2) persons who are not entitled to do so (in this manual referred to as "other combatants"); see more in section 3.5. During the conduct of military operations in an armed conflict, soldiers are permitted to attack enemy forces and other combatants. Nevertheless, the parties to an armed conflict must at all times take all feasible precautions to spare persons entitled to protection, i.e. both civilians and combatants who must be regarded as *hors de combat* due to being in the power of an adverse party, intending to surrender or being unconscious or otherwise incapacitated by wounds or sickness to defend him- or herself.<sup>2</sup>
- 3.3 A person considered to be a lawful target may be attacked. "Attack" means an act of violence intended to injure or take life, or to deprive a person of liberty. The level of certainty required to designate someone as a lawful target is dealt with in sections 2.5–7. When and how a lawful target may be attacked is governed by the law of armed conflict; see particularly chapters 2, 8 and 9. Among other things, the attack must be proportionate. The proportionality principle states that combatants shall avoid attacking lawful targets if such attack would be expected to cause incidental loss of civilian life or the destruction of civilian objects excessive to the concrete and direct military advantage anticipated from the attack. Armed forces, unlike the police, are not required to restrict their use of force against lawful targets ("minimum use of force"). Among other things, this means that there is no requirement under

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<sup>1</sup> *Additional Protocol I, Article 43(3).*

<sup>2</sup> *Additional Protocol I, Articles 41 and 57; Additional Protocol II, Articles 4 and 13.*

international law to capture someone instead of shooting them, unless the person clearly expresses an intent to surrender.

- 3.4 In this manual, it is assumed that Norwegian forces qualify as lawful combatants, and are thus permitted to use armed force in accordance with the law of armed conflict. In other words, this manual adopts as its assumption that Norwegian forces have the status of lawful combatants when participating in an armed conflict, whether international or non-international. The definition of lawful combatants is presented in section 3.5.

## Brief overview of persons qualifying as lawful targets

### 3.5 *Lawful combatants:*

- members of armed forces belonging to a party to a conflict (except persons enjoying special protection; see section 3.11), and members of militias and volunteer corps forming part of such armed forces<sup>3</sup> (section 3.9)
- members of organised resistance movements belonging to a party to an international armed conflict<sup>4</sup> (section 3.17)
- participants in spontaneous resistance against invasion in an international armed conflict (*levée en masse*)<sup>5</sup> (section 3.20)

### *Other combatants:*

- civilians who participate directly in hostilities, either spontaneously or regularly<sup>6</sup> (section 3.21)
- members of organised armed groups not acting on behalf of a state<sup>7</sup> (section 3.40)
- spies<sup>8</sup> (section 3.45)
- mercenaries<sup>9</sup> (section 3.47)

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<sup>3</sup> *Geneva Convention III, Article 4(A)(1); Additional Protocol I, Article 43(2).*

<sup>4</sup> *Geneva Convention III, Article 4(A)(2).*

<sup>5</sup> *Geneva Convention III, Article 4(A)(6).*

<sup>6</sup> *Additional Protocol I, Article 51(3). The term “civilians” includes members of non-organised armed groups in international and non-international armed conflicts, even if they operate in support of a state.*

<sup>7</sup> *Additional Protocol I, Article 51(3).*

<sup>8</sup> *Additional Protocol I, Article 46.*

<sup>9</sup> *Additional Protocol I, Article 47.*



## Right to participate in hostilities

- 3.6 The law of armed conflict is based on the principle that combatants fulfilling certain criteria have the right to participate in hostilities.<sup>10</sup> Accordingly, combatants who do not meet the criteria do not have this right. In this manual, these two categories are therefore designated “lawful combatants” and “other combatants”; see section 3.5.
- 3.7 Persons with the right to participate in hostilities (lawful combatants), are generally members of the armed forces of a state. They act in other words on behalf of a state. As long as they comply with the law of armed conflict, they cannot be held personally responsible for such actions. Lawful combatants cannot be prosecuted for lawful acts of war, such as the killing of a person who is a lawful target. Lawful acts of war are exceptions from national criminal law, and are discussed in greater detail in sections 14.44–46. In addition, lawful combatants must be treated in accordance with particular rules, i.e. as prisoners of war, if captured in an international armed conflict. The rules are designed this way because it is the state, and not persons, who are to be held responsible for lawful acts of war. This also means that only lawful combatants are entitled to immunity from national law for lawful acts of war. In brief, only lawful combatants have authority to determine someone or something a lawful target.
- 3.8 Persons who are not entitled to participate but nevertheless do (“other combatants”) are not entitled to such immunity from prosecution under the law of armed conflict. They can therefore be held accountable under national law, unless the state chooses to grant them immunity.<sup>11</sup> This means that other combatants who attack a person who in principle is a lawful target under the law of armed conflict can be subject to criminal prosecution for their actions under ordinary national criminal law. However, such violations of national law will not constitute war crimes.

## Members of the armed forces

- 3.9 Members of a conflict party’s armed forces are lawful targets unless they enjoy special protection; see section 3.11. They may be attacked as long as they belong to the armed forces, whether participating in combat activity or engaged in other activities such as sleeping or training.
- 3.10 “Members of the armed forces of a state” means the members of organised armed forces, groups and units which:

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<sup>10</sup> *Additional Protocol I, Article 43(2).*

<sup>11</sup> *Additional Protocol II, Article 6(5).*

- are under a command responsible for subordinates and accountable to a state which is a party to the conflict
- are subject to an internal disciplinary system designed to enforce, among other things, compliance with the law of armed conflict,<sup>12</sup> and
- distinguish themselves from civilians through the wearing of uniforms or similar<sup>13</sup>

3.11 The following members of the armed forces enjoy special protection and thus do not constitute lawful targets:

- medical personnel (see chapter 5)
- religious personnel, such as army chaplains (see chapter 5)
- persons who have surrendered/been captured (see chapter 6)
- persons parachuting from an aircraft in distress (see chapter 11), and
- sick/injured/shipwrecked persons who are no longer participating directly in hostilities (see chapters 5 and 10).

Special protection is discussed further in section 4.38 onwards.

3.12 The principle of distinction requires lawful combatants to distinguish themselves from civilians. Armed forces members must therefore generally wear a uniform. Traditionally, military forces will also carry arms openly, meaning weapons will not be hidden under clothing, etc., although this is not a condition for uniformed members of the armed forces to retain their status as lawful combatants.<sup>14</sup> The reason for this is that the uniform makes it sufficiently clear that the person is a combatant. Accordingly, using a hidden pistol holster or clothing to hide small arms does not violate the law of armed conflict. It may nonetheless be practical to carry arms openly, and military commanders may thus order subordinates not to hide their weapons, for this or other reasons. If weapons are hidden to give the impression that one is entitled to some form of protected status, and the situation is exploited to attack the enemy, the action may constitute unlawful perfidy (see chapter 9).

3.13 Norwegian forces must distinguish themselves from the civilian population when participating in armed conflict. This must be done by wearing an approved Norwegian uniform and emblem of nationality. With regard to international operations, that means Norwegian forces shall wear their uniforms while and travelling to and from the area of operation, but not

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<sup>12</sup> *Additional Protocol I, Article 43(1).*

<sup>13</sup> *Additional Protocol I, Article 44(3).*

<sup>14</sup> *Geneva Convention III, Article 4(A)(1); Additional Protocol I, Articles 43 and 44.*

while on leave outside it. Civilians serving in positions that involve direct participation in hostilities shall also be given combatant status, dress in uniforms and hold military rank; they may also carry arms.<sup>15</sup>

- 3.14 Exceptions from the requirement to wear a uniform may be made with the approval of the Force Commander, as in the case of Norwegian forces who are to be engaged in information collection behind enemy lines. Norwegian forces will also be permitted to operate in civilian clothing to avoid recapture during an escape from imprisonment by the enemy. However, members of the armed forces operating in civilian clothing will often be accused of perfidy or espionage if captured by the enemy. These methods of warfare are discussed in chapter 9. In brief, although espionage as such is not a violation of the law of armed conflict, it may violate the national law of the state being spied upon. For perfidy to exist, a lawful combatant would have to kill, injure or capture an enemy after leading the enemy to believe that he is entitled to protection.<sup>16</sup> Since persons who do not satisfy the requirement of distinguishing oneself may lose their entitlement to prisoner-of-war status, the requirement of wearing uniform or similar and exceptions to it are discussed further in chapter 6.
- 3.15 If militias or volunteer corps (often referred to as “paramilitary groups”) or armed police are to be incorporated into the armed forces, this information must be conveyed to the other parties to the conflict in order for such groups to gain the status of members of the armed forces. Such personnel will then also receive the status of lawful combatants, but will simultaneously become lawful targets in the armed conflict.<sup>17</sup> To retain their status as lawful combatants, they must meet other requirements applicable to members of the armed forces, in particular the requirements to be under military command, to be subject to an internal disciplinary system and to distinguish themselves from the civilian population.
- 3.16 In international armed conflicts, members of the armed forces who fall into the enemy’s hands through capture or surrender will be entitled to prisoner-of-war status and immunity from prosecution for lawful acts of war.<sup>18</sup> The rules on the capture and treatment of prisoners are presented in chapter 6, while lawful acts of war are discussed in chapter 14.

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<sup>15</sup> *Section 18 of the Regulations relating to service in international operations (F'OR 2004-12-10 No. 1643).*

<sup>16</sup> *Additional Protocol I, Articles 37 and 46.*

<sup>17</sup> *Additional Protocol I, Article 43(3).*

<sup>18</sup> *Geneva Convention III, Article 4; Additional Protocol I, Article 44(1).*

## Members of organised resistance movements in international armed conflicts

- 3.17 Members of militias and volunteer corps, such as organised resistance movements, that are not incorporated into the ordinary armed forces will be lawful targets for the duration of their membership.<sup>19</sup> Whether someone is a member of such a movement is an assessment that must be based on the information available at the relevant time. This may include information that a person has participated in previous resistance movement operations or that he gives or receives orders from other known members.
- 3.18 “Members of organised resistance movements” means members of groups that:
- a. are commanded by a person responsible for his subordinates
  - b. have a fixed distinctive sign recognisable at a distance
  - c. carry arms openly, and
  - d. conduct their operations in accordance with the law of armed conflict
- 3.19 In addition, they must belong to one of the parties to the conflict. If these conditions are met, they will be lawful combatants and thus entitled to prisoner-of-war status and immunity from criminal prosecution for lawful acts of war; see chapters 6 and 14. Even if these conditions are not met, they may still be lawful targets if they participate directly in hostilities; see section 3.21 onwards. As regards members of organised groups in non-international armed conflicts, see section 3.40 onwards.

## Participants in spontaneous resistance to invasion in an international armed conflict

- 3.20 Participants in spontaneous resistance against invasion (*levée en masse*) are lawful targets for the invading forces for the duration of their participation. This category includes civilians who choose to employ the means and methods available to them to defend themselves against an invading force, but who do not have time to organise themselves or procure fixed distinctive signs. They do not have the opportunity, in other words, to meet all the requirements applicable to lawful combatants presented in sections 3.10. They will nevertheless have the status of lawful combatants and be entitled to prisoner-of-war status provided that they carry arms openly and do not attempt to hide them, and respect the law of armed conflict.<sup>20</sup> This exception from the general

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<sup>19</sup> Geneva Convention III, Article 4(A)(2).

<sup>20</sup> Geneva Convention III, Article 4(A)(6).

requirements applicable to lawful combatants does not apply in occupied territory since the enemy already has control of the area and any resistance can no longer be regarded as spontaneous.

#### EXAMPLE 1: SPONTANEOUS RESISTANCE

During the invasion of Iraq in 2003, US forces encountered resistance from both the Iraqi army and civilian Iraqis who decided to defend themselves against the attack. The civilians who chose to defend themselves against the American forces without having had time to organise themselves can be regarded as participants in *levée en masse*. When the situation later changed into an occupation, Iraqi citizens had time and opportunity to organise themselves and acquire a distinctive sign. Iraqi nationals who continued to fight against the US occupying forces without organising themselves and acquiring a distinctive sign were therefore to be regarded as civilians participating directly in hostilities.

### Civilians who participate directly in hostilities

- 3.21 Military operations may not be directed against civilians. In principle, civilians must also be protected against the effects of hostilities. However, this protection is conditional upon civilians not participating in the armed conflict. In both international and non-international armed conflicts, civilians who participate directly in hostilities become lawful targets for the duration of their participation.<sup>21</sup> In other words, they lose the protection against attack normally enjoyed by civilians, but regain such protection when they are no longer participating directly in hostilities. The terms “direct participation” and “hostilities” are discussed further below, as is the practical application of the conditions.
- 3.22 In some cases, it may be difficult to determine whether the conditions governing direct participation in hostilities are met such that a person loses their protection. To make this determination easier, the various relevant factors will be considered in greater detail below, and examples will be provided of both acts deemed sufficient to lose protected status and situations that do not result in the loss of protected status.

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<sup>21</sup> *Additional Protocol I, Article 51(3); Additional Protocol II, Article 13(3).*

3.23 It is important to remember that if there is doubt as to whether any of the conditions are met, the person in question must continue to be treated as a civilian, and does not lose his protected status.<sup>22</sup> Since it is rarely possible to be certain, some degree of doubt is acceptable, although it must still be more likely than not that the person is participating directly in hostilities. The issue of doubt is discussed further in sections 2.5–7. If insufficient information is available to be able to conclude that a person is participating directly in hostilities, it may nevertheless be lawful to place the person in security internment (see section 6.86 onwards). In addition, civilians who participate directly in hostilities, whether sporadically or regularly, may violate national criminal law. Unlike lawful combatants, civilians do not have the right to participate in hostilities. Even if a person cannot be attacked because it is doubtful at the moment whether he or she satisfies the conditions of direct participation (see section 3.24 onwards), the person may be subjected to criminal prosecution for earlier instances of direct participation for which there is evidence.



*Civilians carrying cases of ammunition for M23 insurgents in the city of Mushaki in the eastern Democratic Republic of the Congo, November 2012. The task of transporting ammunition to the front may constitute direct participation in hostilities and may thus make the persons involved lawful targets. Photo: Phil Moore/ AFP/NTB Scampix.*

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<sup>22</sup> *Additional Protocol I, Article 50(1).*

## *Direct participation*

- 3.24 A concrete assessment is required of whether direct participation can be said to exist in an individual case. To constitute direct participation, an act must:
- be capable of causing damage to military operations or combat capacity, or injury to protected persons or objects
  - be a direct cause of such damage or injury, and
  - be committed with the intent of causing damage to one party to a conflict for the benefit of another
- 3.25 *Damage or injury.* The condition of causing damage or injury means that the act must have a negative effect on the enemy's military operation or capacity, or be capable of causing injury or damage to, or destruction of, protected persons or objects. Damage to the enemy's operations or capacities does not necessarily mean the killing, injury or destruction of persons or objects. It may be sufficient for the acts to have a negative impact on, for example, troop movements, logistics and communications. Damage to the enemy will therefore also normally occur through activities that protect or strengthen one's own military operations or combat capacity, such as purchasing weapons and ammunition to be used to attack the enemy.
- 3.26 *Direct cause.* In order for an action to constitute direct participation in hostilities, it must be capable of causing such damage as described in section 2.22. Accordingly, the action must be necessary to facilitate the act that causes the damage, and be closely linked to it. In other words, it is not just the final, decisive action in a sequence of events that can be regarded as direct participation – such as the firing of a rocket – but also the actions that facilitated the attack, such as its planning or the transportation of personnel and weapons to a suitable location. On the other hand, the action in question must be closely linked with the act that causes the damage. General war efforts, such as financing and the collection of food, do not generally constitute direct participation because their contribution is insufficiently direct.
- 3.27 *Intent.* In addition to the requirements of damage or injury and direct cause, the person in question must have intended both to cause the damage or injury and to support one party to the conflict. This excludes acts unrelated to the conflict, such as ordinary crimes and actions with an incidental negative effect on an operation; an example would be the unintentional blocking of military forces by large groups of persons on a road.

- 3.28 The three requirements above must be met simultaneously. Further, only persons fulfilling these conditions become lawful targets, not other people in their vicinity. For example, a crowd of civilians will not lose its protected status even if individuals in the crowd shoot at a party to a conflict and thus become lawful targets. This issue arose during the attack on Norwegian ISAF soldiers in Maimanah, Afghanistan, on 8 February 2006. As a result of the publication of Mohammed caricatures, including in a Norwegian newspaper, demonstrations took place outside the Norwegian camp. A large crowd gathered, and stones were thrown at the camp. The situation gradually escalated and the demonstrators withdrew, leaving behind a smaller group of individuals. The Norwegian camp came under fire from small arms and rocket propelled grenades (RPGs), and hand grenades were thrown. To defend the camp, fire was directed at various attackers, including persons attempting to set fire to the main building using firebombs. In total, four persons were killed. Those who shot and threw grenades at the camp and attempted to set fire to the building directly participated in hostilities. Civilians participating in the initial phase of the demonstration, however, could not be said to have participated directly in hostilities, and were therefore not lawful targets. Nor were they attacked.
- 3.29 The question of whether a person is participating directly in hostilities must subject to a concrete assessment of all relevant circumstances in the individual instance. One important factor in this assessment will be how crucial the act is to causing the damage or injury.

#### EXAMPLE 2: DRIVING AMMUNITION

A person who uses his civilian truck to deliver ammunition to an active firing position near the front must be deemed an integral part of the ongoing combat operation. He is therefore participating directly in hostilities, and will also be a lawful target when, for example, he stops to take a break.

However, if he transports ammunition from an ammunition factory to an ammunition depot outside the conflict zone, this will not be sufficiently near to be defined as direct participation in the hostilities. This is because the use of ammunition in a specific operation is too remote from his involvement.

It is important to be aware that the ammunition itself and the truck in which it is driven will be lawful targets in the latter scenario as well, even if the actual driving does not constitute direct participation in the hostilities. In the event of a direct attack on the truck and ammunition, all feasible precautions must be taken to avoid the death or injury of the truck driver. If the driver's death or injury cannot be avoided, consideration must be given to whether it is proportionate to the importance of destroying the ammunition (the proportionality principle).



## *Hostilities*

- 3.30 Direct participation must be linked to ongoing hostilities. Although this requirement is met through the three conditions above, it is important to understand what it entails. Hostilities can be described as the use of the means and methods of warfare by one conflict party against another with the aim of causing damage or injury and/or the destruction of persons and/or objects. The term “hostilities” does not encompass the use of force as part of lawful law enforcement or self-defence. In addition to the use of force, the term covers other acts that must be regarded as an integral part of military operations, such as logistics, communications and planning. The significance of the term is discussed further in section 1.19.

## *Application of the conditions*

- 3.31 The question of whether a person is participating directly in hostilities must be settled on the basis of all relevant information available to the decision-maker at the specific time. Although the available information will of course vary from situation to situation, individual decision-makers must take all steps feasible in the circumstances ruling at the time to secure the best possible decision-making basis. The level of decision, i.e. who has authority to decide whether a person is participating directly in hostilities, will also depend on the situation, but is frequently linked to how obvious the direct participation is and how big a threat the action represents. For example, the leader of a squad on patrol that encounters persons about to attack may have authority to decide that this constitutes direct participation and to respond with armed force. On the other hand, the determination that a person is responsible for planning and ordering an attack, such that an attack on that person may be carried out in the future, could require authorisation from a higher command level.
- 3.32 There will be variations in the use and relevance of information sources. Often, intelligence will play an important role in the assessment of whether or not a person is participating directly in hostilities. Examples of information sources include:
- observation of activity
  - human intelligence (HUMINT)
  - signals intelligence (SIGINT)
  - imagery intelligence (IMINT)

3.33 Depending on the circumstances ruling at the time, the following activities may constitute direct participation in hostilities:

- defending military objects against enemy attack
- deploying explosives, such as improvised explosive devices (IEDs), or producing explosives with the intent of using these against the enemy in the near future
- transporting weapons to conduct a planned operation
- giving orders or directives to personnel engaged in hostilities
- making tactical or operational decisions relating to the deployment and use of armed forces
- participation in target selection processes
- actively assisting in electronic warfare or computer network attacks targeting military objects or military personnel, or with the intention of causing the death or injury of civilians or damage to or destruction of civilian objects
- participating in the planning or conduct of attacks
- serving as a forward air controller to direct fire, for example using a mobile telephone or handheld radio
- participating in military training of personnel who will engage in hostilities
- collecting, analysing and/or passing on intelligence about the adversary

### EXAMPLE 3: HUMAN SHIELDS

Human shields are civilians or other protected personnel who stand or are placed next to a military target to shield it against attack. For example, civilians may stand in front of military vehicles to prevent them from moving forward, or stand on the roof of military headquarters to prevent an attack.

Persons who are not acting of their own free will are not lawful targets, and shall therefore be regarded as protected civilians. It may be difficult to determine whether civilians are acting as human shields against their will, or whether they are doing so entirely voluntarily to hinder enemy operations. There are several examples of regimes recruiting human shields through the threat of persecution, either against the persons themselves or their families. There is thus a substantial risk of making an incorrect decision as to whether or not human shields are acting voluntarily. In principle, therefore, human shields are not lawful targets unless there is information that unambiguously indicates that the persons are acting entirely of their own free will. The presence of involuntary human shields does not invalidate a target's status as a lawful target, but does influence the proportionality assessment relating to the attack and the precautionary measures required.

In some cases, intelligence will make it sufficiently clear that the persons in question are voluntarily acting as human shields, meaning that they will qualify as direct participants in hostilities. In such cases, they will lose their status as protected persons and become lawful targets. A further consequence is that they will not be included in any proportionality assessment, i.e. not be regarded as potential civilian losses. This is probably the most important consequence, since the question of attacking them will rarely arise independently of the target they are protecting.

Attacks on civilians acting as voluntary human shields will often be politically sensitive, and will therefore require approval at the operational or strategic level.

#### 3.34 Examples of activities that do not normally constitute direct participation in hostilities include:

- civilians working at an ammunition factory
- civilians providing soldiers with food and shelter
- financial support for the war effort
- political demonstrations, even if violence is used
- civilians who steal weapons from armed forces with the intention of selling them
- crowds of fleeing civilians obstructing the parties to the conflict

- 3.35 Frequently, such activities will qualify as indirect support or participation that does not entail the loss of protection from attack, although they may also constitute criminal acts undertaken for personal gain rather than in support of a party to the conflict.

### *The time aspect: sporadic and regular participation in hostilities*

#### **Sporadic participation and loss of protection**

- 3.36 Civilians who participate directly in hostilities occasionally will be lawful targets, and thus subject to attack, only while preparing for, engaging in, and in the immediate aftermath of, such participation. During this period, the person in question will lose the protection afforded by civilian status. In addition to being a lawful target while taking such actions, the person will also be subject to attack while making preparations integral to the operation, and during transportation to and return from the act constituting direct participation in hostilities. For example, persons who on their own initiative express support for one party to a conflict by throwing firebombs at the other party will also be lawful targets while running away after throwing a bomb. Although such persons will regain protection against attack after completing the assignment and returning to civilian life, they may be arrested and criminally prosecuted by the domestic judicial authorities for violation of national law.

#### **Continuous direct participation**

- 3.37 Civilians who participate regularly in hostilities may, in special cases, lose their right to move in and out of the realm of civilian protection. In other words, they risk subjecting themselves to attack on equal terms with members of the armed forces even when engaged in activities that cannot be characterised as direct participation in hostilities. However, the matters of differentiation and evaluation raised by such cases can be extraordinarily difficult. The guiding principle must remain that civilians, unlike members of organised armed forces, lose their protection from direct attack only for the actual duration of the acts that constitute direct participation in hostilities.
- 3.38 Persons who regularly participate directly in hostilities will often be members of an organised armed group. If the group belongs to a non-state party to a non-international armed conflict, association with the group will not confer other rights or obligations than those applicable to civilians who regularly participate directly in hostilities. Association with such a group will often make it easier to prove that persons are participating directly in hostilities, and are thus lawful targets, than if they operate alone. In many cases it will also be

easier to prove that they participate in hostilities regularly, meaning that they would not have to be “caught red-handed” to be lawful targets.

- 3.39 If a group belonging to a party to an international armed conflict qualifies as an organised resistance group (see sections 3.17–19), the members of the group will be entitled to participate in the armed conflict and be entitled to prisoner-of-war status and immunity from prosecution for lawful acts of war (see chapter 6).

#### EXAMPLE 4: PLACING A ROADSIDE BOMB

A person who sympathises with rebel forces in a conflict has been paid to place a roadside bomb on a road used by the enemy to transport forces. The person has no link to the rebel forces, and normally works as a salesman.

He receives the components of the roadside bomb and instructions for assembling it. He stores the roadside bomb in his cellar until it is dark outside. He then sneaks down to the road, where he digs a hole, positions the bomb and carefully covers it with sand.

The roadside bomb is remotely controlled, and the man has to wait in the vicinity until a vehicle passes. Once the assignment has been completed, he goes home to eat and sleep before going to work.

This person will be a lawful target while preparing to deploy the bomb, including during assembly, while waiting for a vehicle to come and while running away afterwards. After that, he will no longer be a lawful target, but will be subject to arrest and criminal prosecution.

If he does this repeatedly over a period of time, he will lose his protected civilian status and become a lawful target until it is clear that he no longer intends to engage in acts qualifying as direct participation in hostilities.

## Members of organised armed groups not acting on behalf of a state

- 3.40 Persons who are members of organised armed groups and who have a combatant function of behalf of such groups are lawful targets, and may be attacked in the same way as members of the armed forces, i.e. also when engaged in tasks which cannot be characterised as direct participation in hostilities. This is because such persons are regarded as being continuously engaged in the hostilities as part of a group. They are thus expected to

continue participating directly in hostilities for the duration of their membership. Such members will not be regarded as lawful combatants, and will therefore be subject to domestic criminal prosecution for acts of war. They will also not be entitled to prisoner-of-war status.

- 3.41 The membership requirement is not a formal requirement, but rather a question of whether the person has in fact joined an organised armed group and been incorporated into the group's command structure. Membership or actual association can be demonstrated in various ways, although in most cases reliable intelligence will be required. Human intelligence (HUMINT) and signals intelligence (SIGINT) may constitute such reliable sources.

Examples of information indicating membership include:

- information that a person receives or gives orders
- information that a person has command of an armed group
- the wearing of a uniform or other signs of membership

- 3.42 In order to qualify as a lawful target, a person must not only be a member of an organised armed group, but also perform a combatant function in the group. Combatant functions clearly include those performed by persons who carry out attacks, but are not limited to those. Other activities vital to the group's conduct of attacks may also constitute combatant functions. Since organised armed groups generally have the same needs as the armed forces of the state to be able to participate in an armed conflict, a good starting point for identifying a person's role in such a group will be the six basic functions that any military unit must have at its disposal in order to operate. These are: command and control for leadership and coordination purposes, capabilities to use against the enemy, mobility to move, force-protection, intelligence to establish situational awareness and logistics to provide supplies of all kinds.<sup>23</sup>

#### EXAMPLE 5: THE COOK

In evaluating a cook who prepares food for members of an organised armed group, it will make a significant difference whether the person in question runs a "canteen" in an area visited from time to time by members of the organised armed group, or whether the cook accompanies the group on tactical manoeuvres and operations, hides with the group in the mountains or forest and otherwise acts as an integral part of the group.

In the first instance, the cook must be regarded as a protected civilian who delivers services to armed forces, whereas in the second instance he is subject to attack in his capacity as an integral part of the group and its hostile acts, as are combatant uniformed cooks in regular armed forces.

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<sup>23</sup> *Forsvarets fellesoperative doktrine* [Joint operations doctrine of the Norwegian Armed Forces] (published by Defence Staff Norway 2007), paragraph 0416.

- 3.43 Persons who support a group indirectly – through general war efforts, say – will not be considered “participants”, and will therefore not be lawful targets. This includes persons providing exclusively medical or religious support, persons providing financial support, and suppliers of food and general equipment. The examples in sections 3.33 and 3.34 of acts constituting/not constituting direct participation will also be relevant here.
- 3.44 Membership, i.e. association with an organised armed group, will be relevant in substantiating the likelihood that a person who has previously participated in hostilities will do so again. In other words, such membership increases the likelihood that a person will in the near future again commit acts amounting to direct participation in hostilities. Membership could thus make it easier to identify future lawful targets than would regular participation in hostilities by persons without such an affiliation.



*Armed Taliban warriors at a secret base in eastern Afghanistan. Photo: Stringer/ Afghanistan/ Reuters/ NTB Scanpix.*

## Spies

- 3.45 In armed conflicts, the term espionage is used to describe information collection about the enemy in enemy-controlled territory by persons who are not wearing the uniform of their own forces. Spies who are members of armed forces will be lawful targets. Although there is no prohibition against espionage under international law, spies who are captured while engaged in such information collection will not be entitled to prisoner-of-war status or immunity in connection with lawful acts of war.<sup>24</sup> See further discussion of espionage in sections 9.46–49.
- 3.46 Persons engaged in gathering information who are not members of the armed forces may qualify as civilians participating directly in hostilities or as members of organised armed groups. If the conditions described in section 3.21 onwards or section 3.40 onwards are met, such persons may also be lawful targets.

## Mercenaries

- 3.47 Briefly put, mercenaries are persons who participate directly in hostilities in an armed conflict in order to get paid, rather than because they support the aims of a party to the conflict. Since they participate directly in the hostilities, they will be lawful targets irrespective of whether or not they meet the special conditions to qualify as mercenaries. Moreover, in many cases they will operate in such a manner as to lose civilian protection for prolonged periods; see section 3.21 onwards and section 3.40 onwards. A complete list of the special conditions that have to be met to qualify as a mercenary can be found in section 6.21.
- 3.48 The use of private actors to conduct military assignments has long been a challenge in armed conflicts, not least because it is difficult to hold such actors accountable for their actions. Attempts have therefore been made to prohibit such activities internationally. Although a special UN Convention makes it an offence to act as a mercenary,<sup>25</sup> many states, including Norway, have chosen not to ratify it. Further, the present definition of a mercenary under the law of armed conflict does not enjoy international acceptance, and is also so narrow as to exclude many cases. To qualify as mercenaries, private actors must not only participate directly in the hostilities but have been recruited specifically to fight in an armed conflict for a country of which they are not nationals or residents, and for whose armed forces they are not members. Moreover, their

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<sup>24</sup> *Additional Protocol I, Article 46.*

<sup>25</sup> *UN International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 4 December 1989 (the Mercenary Convention).*



primary motivation for participating in the hostilities must be personal gain, and they must have been promised substantially higher compensation than combatants in the armed forces would have been offered for the same job. Persons on official assignment on behalf of the armed forces of another state are not regarded as mercenaries.<sup>26</sup>

- 3.49 Persons who meet these conditions are not lawful combatants, and thus have no entitlement to prisoner-of-war status or immunity in respect of lawful acts of war, even if they operate together with other international forces that are party to a conflict.

## Special comments on private contractors and security companies

- 3.50 Private contractors and the persons working for private security companies are persons who are not members of the armed forces of a country or an organised armed group. Such persons may play many different roles in an armed conflict, from hygiene and canteen services to working as armed guards. In many cases, they will perform civilian tasks and be protected civilians, but like other civilians they could become lawful targets if, and for such time as, they participate directly in hostilities (see section 3.21 onwards and section 3.40 onwards). For example, providing armed guard services for a civilian will not necessarily constitute direct participation in hostilities, whereas sentry services for a military unit could. The activities of private parties operating under arms in areas of armed conflict have long posed major challenges, particularly relating to the degree of force used. Like other civilians, private contractors are only entitled to use force in self-defence. They are therefore expected not to participate in the hostilities, but in many cases they have done so anyway, resulting in violations of national law. Because such actors are generally foreigners, the local authorities may face both legal and practical challenges in prosecuting them. They may, for example, return to their homeland before being arrested. If private parties fulfil the conditions in section 6.21, they will be mercenaries.
- 3.51 Even if private contractors or security companies are not participating directly in hostilities, their activities or mere presence may raise the risk of unintentional or incidental death, injury or damage.
- 3.52 Norwegian forces shall not use private contractors to perform combatant functions or in the treatment of prisoners.

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<sup>26</sup> *Additional Protocol I, Article 47.*

## USE OF PRIVATE CONTRACTORS

No private actors shall be permitted to perform combatant functions. "Combatant functions" refers to functions which under the law of armed conflict may only be performed by persons entitled to participate directly in hostilities without invoking criminal responsibility. As a rule, only members of the armed forces, excluding medical personnel, army chaplains, military patients and prisoners of war, are lawful combatants. If there is doubt about whether a function should be regarded as a combatant function, the Norwegian Armed Forces shall undertake a legal assessment of the matter before any agreement is concluded with the private party. Nor shall private parties be used to handle prisoners, including for activities during which the private party may come into direct or indirect contact with prisoners/retained personnel.

Konsept for offentlig privat partnerskap (OPP) i forsvarssektoren [Concept for public-private partnerships in the defence sector] (2005), section 3.4.

## Applicable principles in case of doubt whether a person is a lawful target

- 3.53 In order for an attack on a person to be permitted, it must be more likely than not that the person is a lawful target (see sections 2.5–7). When under armed attack by a group of persons, the group will more than likely be a part of the enemy's forces. An attack that has been subject to prior approval shall not be carried out if it becomes apparent that the person or persons targeted for attack are not lawful targets after all.
- 3.54 In cases where persons are present in the vicinity of a lawful target and it is not highly probable that these persons are themselves lawful targets, they shall be treated as protected persons. In such cases, an assessment will be required as to whether or not the expected civilian losses are proportionate, i.e. proportionate to the concrete and direct military advantage anticipated.
- 3.55 In situations where it is difficult to determine whether or not a person is a lawful target, it is important to be aware of the relationship between the law of armed conflict and personal self-defence. The right of personal self-defence

applies simultaneously, but distinct from, the law of armed conflict. Accordingly, in dangerous situations presenting an imminent threat to personal life or health it will be lawful to use force regardless of whether the person presenting the threat is a lawful target. However, the restrictions on the use of force that apply under the right of self-defence are narrower than in the case of lawful acts of war, since the type and degree of force that may be used are more limited. Further, no person should plan to use the right of self-defence as an additional ground for using force when conducting a military operation. The relationship between the right of personal self-defence and lawful acts of war is covered in sections 1.55–60, while the right of self-defence as a ground for exemption from criminal responsibility is considered in sections 14.47–53.

## Special comments on child soldiers

- 3.56 The use of children as soldiers is prohibited. Children are defined as persons under the age of 18.<sup>27</sup> Nevertheless, children may be lawful targets on the same basis as adults if they are soldiers in armed forces or participate directly in hostilities.

## Special comments on UN forces

- 3.57 Whether or not UN forces are lawful targets will depend on the actual situation on the ground and the tasks being performed by such personnel. In the context of a peacekeeping operation in which the forces are not acting as a party to a conflict, they will be entitled to the same protection as civilians. That means they shall not be regarded as lawful targets, and will normally only be permitted to use force in self-defence. Any right to use force beyond the scope of self-defence will be described in the mandate and rules of engagement for the operation.
- 3.58 If UN forces employ armed force beyond the scope of self-defence for some reason, they may become party to an armed conflict irrespective of whether they are acting under a mandate from the UN Security Council.<sup>28</sup> The forces may then become lawful targets for lawful combatants of the enemy, and will themselves be lawful combatants with the rights and duties this entails under the law of armed conflict. In order for the participating states in UN forces to become parties to an international armed conflict, they must fight against the forces of another state. If they fight against non-state actors, the conflict will be non-international even though international forces are present.

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<sup>27</sup> *UN Convention on the Rights of the Child (1989) Article 1; see also the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000.*

<sup>28</sup> *Convention on the Safety of United Nations and Associated Personnel (1994), Article 2.*



# 4

## Protection and protected persons

### Introduction

- 4.1 This chapter describes the protection entitled to different groups of persons. The law of armed conflict entails rules protecting combatants and civilians in different ways:
- by defining lawful targets and persons who are protected from direct attack
  - by regulating the choice and use of means and methods of warfare
  - by defining who must be protected from the effects of hostilities
  - by granting general and special protection to all persons in the power of a party to a conflict
- 4.2 Soldiers and other combatants are entitled to protection from, among other things, superfluous injury and unnecessary suffering and inhumane treatment. This is clear from the rules on targeting and the treatment of combatants who are captured or otherwise *hors de combat*. Moreover, *hors de combat* persons are entitled to protection against direct attack. This is discussed further in sections 4.7–11.
- 4.3 Persons who are not lawful targets, such as civilians and medical personnel, shall be protected from attack. In other words, they may not be targeted. The reason for this is that attacks on protected persons achieve little or no military advantage. Even if protected persons are not attacked directly, they will in many cases suffer from the effects of attack on lawful targets. Accordingly, there is an additional requirement that such incidental damage, injury or loss must be avoided wherever possible, and must be proportionate to the anticipated military advantage in order to be lawful (see chapter 2).
- 4.4 Further, civilians are entitled to additional protection if they are in the power of a party to a conflict, i.e. if they have been captured, are present in the area in which the conflict party exercises authority, or are otherwise under the control of the conflict party.<sup>1</sup> There are two types of protective rules: general rules applicable to all civilians in such situations and special rules applicable to specific groups.

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<sup>1</sup> Geneva Convention IV and Additional Protocol I.

- 4.5 The following groups are entitled to special protection:
- sick and injured persons<sup>2</sup>
  - shipwrecked persons<sup>3</sup>
  - persons who have parachuted from an aircraft in distress<sup>4</sup>
  - prisoners of war, from the time of surrender<sup>5</sup>
  - medical personnel and religious personnel<sup>6</sup>
  - civilian civil defence personnel<sup>7</sup>
  - parlementaires.<sup>8</sup>
- 4.6 Other groups which are subject to rules on special protection in addition to the general right to protection include:
- civilians who accompany armed forces<sup>9</sup>
  - journalists<sup>10</sup>
  - military security internees<sup>11</sup>
  - civilian security internees<sup>12</sup>

## Protection of combatants and definition of *hors de combat*

- 4.7 Combatants, whether or not they are lawful combatants, are protected by the prohibition against using means of warfare, i.e. weapons, projectiles and material, and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.<sup>13</sup> They are also protected by the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, which applies in all situations.<sup>14</sup> Further, combatants must be protected against perfidy and the misuse of recognised emblems and emblems of nationality. There is also a prohibition against issuing orders not to give quarter, or

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<sup>2</sup> *Geneva Conventions I and II.*

<sup>3</sup> *Geneva Convention II.*

<sup>4</sup> *Additional Protocol I, Article 42.*

<sup>5</sup> *Geneva Convention III.*

<sup>6</sup> *Geneva Convention I and Additional Protocol I.*

<sup>7</sup> *Additional Protocol I, Articles 62–63.*

<sup>8</sup> *Hague Convention IV, Articles 32–34.*

<sup>9</sup> *Geneva Convention III, Article 3.*

<sup>10</sup> *Additional Protocol I, Article 79.*

<sup>11</sup> *Geneva Convention III, Article 4(B).*

<sup>12</sup> *Geneva Convention IV, Articles 79–141.*

<sup>13</sup> *Additional Protocol I, Article 35(2).*

<sup>14</sup> *European Convention on Human Rights, Article 3; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) of 10 December 1984.*

threatening not to give quarter.<sup>15</sup> Means and methods of warfare are discussed further in chapters 8 and 9. Combatants on the other hand are not protected by the proportionality principle, i.e. the prohibition against disproportionate incidental damage or injury. Only disproportionately large civilian losses are prohibited.

4.8 Combatants who become *hors de combat* are entitled to additional protection. As well as being granted the protection described above, they must be protected against the effects of hostilities by not being made the object of attack, and they must be treated humanely under all circumstances.<sup>16</sup> Since combatants do not become civilians even when they are *hors de combat*, they are not protected by the proportionality principle. Whenever feasible in the planning and execution of an attack, however, consideration should be given to the presence of such persons as sick or injured soldiers. The entitlement of *hors de combat* persons to protection is discussed further in chapters 5 and 6.

4.9 *Hors de combat* persons are former combatants who:

- a. are in the power of an enemy
- b. clearly express an intention to surrender, or
- c. have been rendered unconscious or otherwise incapacitated by wounds or sickness, and are therefore incapable of defending themselves<sup>17</sup>

4.10 Having a right to protection is dependent on a person's refraining from any hostile act and not attempting to escape.<sup>18</sup> An injured person who continues to fight or attempts to obtain a weapon to continue fighting will not be protected. In other words, he will continue to be a lawful target. The loss of status as protected personnel is dealt with in greater detail in sections 4.12–16 below. If a person incorrectly gives the impression of being entitled to protection and then abuses the enemy's trust to attack, this will constitute perfidy (see sections 9.23–25).

4.11 Examples of *hors de combat* persons include:

- sick persons (see chapter 5)
- injured persons (see chapter 5)
- shipwrecked persons (see chapter 5)
- persons who have parachuted from an aircraft in distress (see chapter 11)
- surrendered or captured persons, including prisoners of war (see chapter 6)
- dead persons (see chapter 5)

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<sup>15</sup> *Additional Protocol I, Articles 37–40.*

<sup>16</sup> *Geneva Conventions I–IV, common Article 3; Additional Protocol I, Article 41(1).*

<sup>17</sup> *Additional Protocol I, Article 41(2).*

<sup>18</sup> *Additional Protocol I, Article 41(2).*

#### EXAMPLE 1: SURRENDER

There is no recognised method of surrender. Any surrender must therefore be assessed on the basis of the situation and the available facts. White flags are often associated with surrender, but are actually intended as a symbol of a desire to negotiate. A person with a white flag should nevertheless generally be permitted to deliver his message, whether concerning surrender or other issues. It is common practice for combatants who wish to surrender to lay down their weapons and make themselves visible to the enemy with their arms lifted above their heads, although this is not a condition of surrender. Persons who wish to surrender must give a clear sign that this is what they intend.

In the case of persons who have parachuted from an aircraft in distress, surrender will only become feasible once they have landed and taken off their parachute. If they wish to surrender, this must be clearly indicated as soon as possible.

### Protected personnel and loss of protection

- 4.12 Civilians and combatants who have become *hors de combat* have status as protected persons. This means that all persons falling into these categories are entitled to protection. Civilians are defined in sections 4.18–20, while *hors de combat* persons are defined in sections 4.9–11.
- 4.13 A condition of protection is that the persons in question refrain from acts harmful to the enemy, typically acts constituting direct participation in hostilities; see section 3.21 onwards. In order for an attack on an otherwise protected person to be permissible, those planning and conducting the attack must take all feasible precautions to verify that the person is in fact committing or has committed acts harmful to the enemy; see sections 2.5–7.
- 4.14 Acts harmful to the enemy may include:
- the use of armed force against the enemy, except in self-defence against unlawful attack
  - positioning with the intention of continuing to fight
  - sentry duty and the protection of military units
  - helping direct fire and reporting the enemy's position



- 4.15 For civilians, the consequences of losing protected status are that they:
- become lawful targets, and
  - are not deemed potential civilian losses to be included in any proportionality assessment

Since *hors de combat* persons are not civilians, and therefore are not entitled to protection under the proportionality principle, the only consequence of losing protected status is that they become lawful targets.

- 4.16 The length of time for which a person loses their protection against attack depends on the reason for the loss of protected status. This is discussed in chapter 3, on persons who are lawful targets. Persons suspected of committing or having committed acts harmful to the enemy are still entitled to some protection (see section 4.7 onwards). However, the kinds of acts committed by such persons may affect the rights they enjoy if they are captured (see chapter 6).

## Protection of civilians

- 4.17 The parties to a conflict have obligations to civilians in general and to the civilians under their power in particular. All civilians shall be protected against the effects of hostilities. A party to a conflict also has additional obligations to persons in areas it controls.

### *Definition of civilian*

- 4.18 A civilian is any person not belonging to the armed forces, as defined in sections 3.9–19. The civilian population encompasses all who are civilians.<sup>19</sup>
- 4.19 A civilian population will not lose its civilian nature even if it includes persons who do not satisfy the definition of civilians.
- 4.20 Civilians who participate directly in hostilities lose their protected status for the duration of their participation. Direct participation is defined in section 3.21 onwards. Protection is lost during preparations for, and the conduct and immediate aftermath of, participation. Examples of acts that may constitute direct participation in hostilities include giving orders and directives to personnel engaged in hostilities, transporting weapons for the conduct of a planned operation and defending a lawful target against enemy attack.

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<sup>19</sup> *Additional Protocol I, Articles 50(1) and 50(2).*

## *Protection against the effects of hostilities*

- 4.21 Civilians and others who are not participating in hostilities are not lawful targets, and shall be protected against the effects of attacks and other forms of hostilities wherever feasible. There is a prohibition against directing attacks at civilians or civilian objects, and incidental damage or injury must be avoided as far as possible. Incidental damage or injury to civilians or civilian objects are unlawful if they are disproportionate to the military advantage anticipated from the attack. For further discussion of proportionality, the prohibition against indiscriminate attack and precautionary requirements in connection with attacks, see chapter 2.
- 4.22 Acts of violence or threats intended primarily to spread terror among the civilian population are prohibited.<sup>20</sup> For example, it is impermissible to fire missiles into areas populated by civilians in order to frighten them, as Iraq did against Israel and Saudi Arabia during the first Gulf War. Attacks on civilians by way of reprisals are also prohibited.<sup>21</sup> For further discussion of prohibited methods of warfare, see chapter 9.



*Civilians shall be protected against the effects of hostilities whenever feasible. The basic way of accomplishing this is to distinguish combatants from civilians. However, if civilians are in the vicinity of combat activity, the combatants must take all feasible precautions to protect them. The picture shows Norwegian forces protecting Afghan children during an exchange of fire by hiding them behind their vehicles and making sure they do not run into the line of fire. Photo: Lars Kroken/Norwegian Armed Forces Media Centre.*

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<sup>20</sup> Additional Protocol I, Article 51(2); Additional Protocol II, Article 13(2).

<sup>21</sup> Additional Protocol I, Article 51(6).

## *Protection of persons in the power of a conflict party – general rules*

- 4.23 The basic rules presented here apply to all civilians in the power of a party to a conflict. These rules are minimum guarantees, and apply when persons do not enjoy protection under other rules. Persons are in the power of a conflict party when in territory under the control of that party. In other words, the rules are not limited to persons under the physical control of a party, such as internees. In international armed conflicts, the parties to the conflict will have certain additional obligations; see section 4.35 onwards. When a territory is occupied by the enemy, the rules of occupation applies as well; see chapter 13.
- 4.24 Civilians in the power of party to a conflict shall always be treated humanely. They shall not be subject to adverse distinction of any kind on the basis of race, skin colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, place of birth or other status, or on the basis of any similar criteria.<sup>22</sup> “Adverse distinction” refers to discrimination that is biased or unreasonable, such as giving better medical treatment to a specific ethnic group without it being medically justified.
- 4.25 The following acts are prohibited at all times and everywhere, and whether committed by civilians or military agents:
- a. violence against the life, health, or physical or mental well-being of persons, in particular:
    - i. murder
    - ii. torture of all kinds, whether physical or mental
    - iii. corporal punishment, and
    - iv. mutilation that is not necessary on medical grounds, and medical or scientific experiments (see sections 5.61–63)
  - b. violations of personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault
  - c. the taking of hostages
  - d. slavery and slave trade of any forms
  - e. looting
  - f. collective punishments
  - g. threats to commit any of the above acts<sup>23</sup>

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<sup>22</sup> *Geneva Conventions I–IV, common Article 3; Geneva Convention IV, Article 27; Additional Protocol I, Articles 11 and 75(1); Additional Protocol II, Article 4.*

<sup>23</sup> *Geneva Conventions I–IV, common Article 3, Additional Protocol I, Article 75(2) and Additional Protocol II, Article 4.*

- 4.26 In addition to the prohibition against torture and other cruel, inhuman or degrading treatment or punishment, it is prohibited to send persons to countries or hand over persons into the control of others if there is a real risk that they will be subjected to such treatment.<sup>24</sup>
- 4.27 All persons who do not participate directly in hostilities, or who have stopped participating in hostilities, are entitled to respect for their person, family rights, religious convictions and practices, and their manners and customs. Among other things, this means that all practical steps must be taken to ensure that persons who are imprisoned or interned are given the opportunity to practice their religion, and that the dead are buried in accordance with their religious beliefs. These persons are also entitled to respect for their dignity, i.e. they shall not be subjected to degrading punishments or work.<sup>25</sup> Women and children are often especially vulnerable during armed conflict, and are to be granted special protection (see sections 4.48–53).
- 4.28 Civilians shall not be used to shield lawful targets against attack or to shield, favour or impede military operations, for example by placing military objectives among civilians. The movement of the civilian population or individual civilians shall not be directed in order to attempt to shield military objectives from attacks or to shield military operations.<sup>26</sup> Further, it is unlawful to order the displacement of the civilian population unless demanded by the security of the civilians involved or by imperative military reasons.<sup>27</sup> Lawful and unlawful methods of warfare are discussed further in chapter 9.
- 4.29 If the civilian population lacks adequate access to supplies of food, medicine, clothing, shelter and other supplies necessary for survival, the authorities in control of the territory must provide impartial humanitarian relief. Such relief actions shall be implemented without adverse distinction of any kind, so that any differential treatment is based solely on need and not, for example, religion or ethnicity. Such relief actions are dependent upon the agreement of the parties concerned. The parties to a conflict shall permit and facilitate rapid, unhindered passage for all relief consignments, equipment and personnel providing such relief, even if destined for the enemy's civilian population.<sup>28</sup> In general, and where feasible, such relief actions shall be conducted by civilian personnel to reduce the risk of being the object of an attack and of the civilian population not receiving the help it needs.

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<sup>24</sup> *European Convention on Human Rights, Article 3 and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention against Torture) of 10 December 1984.*

<sup>25</sup> *Geneva Convention I, Article 17, Geneva Convention III, Articles 34–36 and 120, Geneva Convention IV, Articles 27.1, 76.3, 86, 93 and 130.*

<sup>26</sup> *Geneva Convention IV, Article 28; Additional Protocol I, Article 51(7).*

<sup>27</sup> *Geneva Convention IV, Article 49; Additional Protocol II, Article 17.*

<sup>28</sup> *Additional Protocol I, Article 70(1–2); Additional Protocol II, Article 18(2).*

- 4.30 To protect persons who are particularly vulnerable to the effects of war, the parties to a conflict may establish hospital and safety zones and localities, or neutralised zones. Hospital and safety zones and localities may be established to protect sick, injured, disabled and elderly persons, children, pregnant women and mothers with children under the age of seven. The parties may agree to recognise such zones and localities.<sup>29</sup> Injured and sick combatants or non-combatants may also be protected by establishing neutralised zones in areas where combat activity is continuing. Such neutralised zones may also be used to protect civilians taking no part in the hostilities and not performing any work of a military character, provided that they remain in the neutralised zone. When neutralised zones are established, the parties to the conflict must agree on the geographical location of each zone. They must also conclude a written agreement fixing the beginning and duration of the neutralisation of the zone.<sup>30</sup>
- 4.31 Any civilian who is arrested, imprisoned or subjected to security internment for actions related to an armed conflict shall be informed promptly, in a language he understands, of the reasons for his arrest, imprisonment or security internment. Except in cases of arrest or imprisonment for penal offences, such persons shall be released without unnecessary delay and in any event as soon as the circumstances justifying the arrest, imprisonment or security internment have ceased to exist.<sup>31</sup>
- 4.32 In order for a sentence to be passed or executed on a civilian found guilty of a criminal offence related to the armed conflict, a conviction must be pronounced by an impartial and regularly constituted court that respects the generally recognised principles of sound judicial procedure. If Norwegian forces have captured a person, the Norwegian authorities must take all possible steps to arrange for that person to appear before a court if the need arises. The court to be used in a specific operation must be approved by the Norwegian authorities. For persons in Norwegian custody, the death penalty will never be at issue; nor shall Norwegian forces ever contribute to a person being subjected to the death penalty.<sup>32</sup>

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<sup>29</sup> *Geneva Convention IV, Article 14.*

<sup>30</sup> *Geneva Convention IV, Article 15.*

<sup>31</sup> *Additional Protocol I, Article 75(3).*

<sup>32</sup> *Additional Protocol I, Article 75(4); Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, 11 July 1991; Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances, 3 May 2002.*

- 4.33 Women whose liberty has been restricted for reasons related to an armed conflict shall be held in quarters separate from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are imprisoned or interned, they shall, whenever possible, be held in the same place and accommodated as family units. Special protection of women in armed conflicts is discussed further in sections 4.48–53.<sup>33</sup>

Internment and treatment of prisoners is discussed more extensively in chapter 6.

- 4.34 None of the general rules on protecting civilians shall be interpreted so as to restrict or conflict with other provisions granting greater protection. A number of groups of persons enjoy special protective rules in addition to these basic rules. This includes sick, injured and shipwrecked persons, medical and religious personnel, and civilians under the control of the enemy in the context of an international armed conflict.

### *Specifics with regard to international armed conflicts*

- 4.35 Protected persons in the power of an enemy, i.e. a party to a conflict of which they are not nationals, are entitled to additional protection. These rules apply only to international conflicts. Although the nationals of a given country are naturally also entitled to protection (see the general rules in section 4.23 onwards), international law recognises that an enemy's nationals will be more exposed to assault and therefore require special protection in addition to the general protections afforded to them.
- 4.36 Protected persons shall not be subjected to physical or moral coercion, for example in the form of threats of violence against the person or family members, or threats to remove access to food rations or work. This prohibition applies irrespective of the purpose of subjecting persons to such coercion, and includes, in particular, attempts to obtain information.<sup>34</sup> Moreover, protected persons shall be granted full opportunity to contact representatives of any protecting power (see chapter 14), the International Committee of the Red Cross (ICRC) and the national Red Cross association in the country in which they are located, as well as any other organisation that may be capable of assisting them. The parties shall grant such organisations every opportunity in this context, within the bounds set by military or security considerations. Among other things, steps must be taken to facilitate visits by representatives of institutions whose purpose is to provide spiritual aid or material relief to protected persons.<sup>35</sup> Visits by the ICRC are discussed in chapter 14.

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<sup>33</sup> *Additional Protocol I, Article 75(5).*

<sup>34</sup> *Geneva Convention IV, Article 31.*

<sup>35</sup> *Geneva Convention IV, Article 30.*

- 4.37 Even though the parties to a conflict have a duty to shield protected persons against hostilities as far as possible, the parties may implement control or security measures made necessary by the war, including with respect to protected persons.<sup>36</sup> For example, it will be permissible, if necessary, to require registration and periodic reporting to the police, to prohibit the bearing of arms, to refuse access to certain areas and, as the most extreme measure, to specify where certain persons may live or to intern them.

## Persons enjoying special protection

### *“Special protection”*

- 4.38 Certain categories of persons are entitled to special protection beyond what follows from the general rules of protection. Special protection status affords individuals additional protection against the effects of hostilities and with regard to their treatment. In many cases, the special rules clarify rights rather than introduce new ones. Since various groups have been found to be particularly vulnerable to suffering during war, rules have been developed to ensure that account is taken of their particular needs.

Special protective rules for persons in occupied territory are discussed separately, in chapter 13. These rules apply in addition to the rules discussed here.

### *Sick, wounded and shipwrecked persons*

- 4.39 Sick, wounded and shipwrecked persons shall be respected and protected, irrespective of which party they are associated with and irrespective of whether they are civilians or military personnel. They shall be treated humanely in all circumstances and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. They shall not be subjected to any form of discrimination except as indicated by medical factors.<sup>37</sup> The parties to a conflict are also obliged, without delay, to take all possible measures to search for and collect sick and wounded persons and to protect them from pillage and ill-treatment.<sup>38</sup>

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<sup>36</sup> Geneva Convention IV, Article 27, fourth paragraph.

<sup>37</sup> Geneva Conventions I–IV, common Article 3; Additional Protocol I, Article 10;

<sup>38</sup> Geneva Convention I, Article 15; Geneva Convention II, Article 18, first paragraph; second paragraph; Additional Protocol II, Article 8.

- 4.40 If needed, all available help shall be afforded to civilian medical personnel in areas where civilian medical services are disrupted due to combat activity.<sup>39</sup>

The protection of sick, injured and shipwrecked persons is discussed further in chapter 5.

### *Missing and dead persons*

- 4.41 Families have a right to know the fate of their relatives.<sup>40</sup> Accordingly, all parties to a conflict shall, as soon as circumstances and military considerations permit, and at the latest after the end of active hostilities, search for persons who have been reported missing by an adversary. The adversary shall transmit all relevant information concerning the missing persons to the national information bureau for the conflict in order to facilitate such searches; see section 4.75 onwards.<sup>41</sup>
- 4.42 A further requirement is to search for dead persons and to protect them from pillage and mutilation, provided that military considerations permit.<sup>42</sup> Further, the parties to the conflict shall, as soon as possible, facilitate and if necessary direct the search for, and register information concerning, such persons if they have died while in the custody of the party or in other circumstances as a result of hostilities or occupation.<sup>43</sup> Information regarding the identity of dead persons should also be sent to the national information bureau. Parties to international armed conflicts shall, wherever possible, facilitate the return of dead persons and their property if requested by the enemy or the family of the dead.<sup>44</sup> Although this is not required in non-international armed conflicts, steps should be taken to facilitate it.
- 4.43 If the return of a dead person is impossible, the person shall be buried in a dignified manner, if possible in accordance with the ritual of his or her professed religion or ethical belief, and in a marked grave.<sup>45</sup>

Missing and dead persons are discussed further in chapter 5.

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<sup>39</sup> *Additional Protocol I, Article 15(2).*

<sup>40</sup> *Additional Protocol I, Article 32.*

<sup>41</sup> *Geneva Convention I, Article 15, first paragraph; Geneva Convention II, Article 18, first paragraph; Geneva Convention IV, Article 16, second paragraph; Additional Protocol I, Article 33.*

<sup>42</sup> *Geneva Convention I, Article 15, first paragraph; Geneva Convention II, Article 18, first paragraph; Geneva Convention IV, Article 16, second paragraph; Additional Protocol I, Article 34(1); Additional Protocol II, Article 8.*

<sup>43</sup> *Additional Protocol I, Article 33(2).*

<sup>44</sup> *Geneva Convention I, Article 17, third paragraph; Geneva Convention III, Article 120, sixth paragraph; Geneva Convention IV, Article 130, second paragraph; Additional Protocol I, Article 34(2–3).*

<sup>45</sup> *Geneva Convention I, Article 17; Geneva Convention II, Article 20; Geneva Convention III, Article 120; Geneva Convention IV, Article 130; Additional Protocol II, Article 8.*



### *Prisoners of war and interned persons*

- 4.44 Persons who are captured or interned, or who have surrendered, whether they are military or civilian, are entitled to adequate food and drinking water, clothing, protection against the rigours of the climate and the dangers of the armed conflict, and any necessary medical assistance.<sup>46</sup>

Prisoners of war and internees are discussed further in chapter 6.

### *Medical and religious personnel*

- 4.45 Medical and religious personnel (such as army chaplains) shall be respected and protected at all times, and shall not be objects of attack. They shall be separated from lawful targets wherever possible. To ensure effective protection, such personnel and such units shall be marked with a protective emblem, and medical installations and religious buildings shall be located a sufficient distance from lawful targets. For example, field hospitals should not be placed close to military headquarters. Medical and religious personnel shall not be prevented from performing their work, and shall have access to all places where their services are required, subject to such control and security measures as the relevant conflict party considers necessary. They shall not be compelled to carry out tasks which are incompatible with their humanitarian mission. Further, medical personnel cannot be required to give priority to any person in the performance of their duties, except for of urgent medical reasons.<sup>47</sup>
- 4.46 Medical personnel are persons exclusively engaged with medical assignments or the administration and operation of medical units or medical means of transport.<sup>48</sup> They may be military personnel or civilians belonging to, authorised by or at the disposal of a party to a conflict.<sup>49</sup> Religious personnel are civilian or military persons engaged exclusively in the performance of religious duties. Religious personnel are entitled to special protection if they are attached to armed forces, medical units or civil defence organisations associated with a party to a conflict. Other religious personnel shall be treated as civilians, and shall enjoy the general right to protection this confers (see section 4-17 onwards).<sup>50</sup>

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<sup>46</sup> *Hague Convention Article 7; Geneva Convention III, Articles 25–32 and 125; Geneva Convention IV, Articles 76, 85, 87, 89–92 and 142; Additional Protocol II, Article 5.*

<sup>47</sup> *Geneva Convention I, Article 12, third paragraph, and Articles 19–23; Geneva Convention II, particularly Articles 12, 22, 36 and 43.3; Additional Protocol I, Articles 10 and 12–18; and Additional Protocol II, Articles 7–12.*

<sup>48</sup> *Geneva Convention I, Articles 24–26; Geneva Convention II, Article 36; Geneva Convention IV, Article 20; Additional Protocol I, Articles 12(1) and 15; Additional Protocol II, Article 9.*

<sup>49</sup> *Additional Protocol I, Article 12(2).*

<sup>50</sup> *Geneva Convention I, Article 24, Geneva Convention II, Article 36, Additional Protocol I, Article 15 and Additional Protocol II, Article 9.*

- 4.47 In international conflicts, medical and religious personnel (army chaplains) may only be taken prisoner if they are needed to provide medical or spiritual assistance to prisoners of war.<sup>51</sup>

Medical personnel and religious personnel are discussed further in chapter 5.

### *Special comments on women, children and families*

- 4.48 In principle, the rules of the law of armed conflict are gender- and age-neutral. That means the law of armed conflict grants equal protection to men and women of all ages, and the conditions under which one may lose protection as a civilian are the same for women and men. In practice, however, women and children are more vulnerable to suffering in wartime. Among other things, they are more susceptible to assault and inhumane treatment. As a result, certain special rules on the protection of women and children have been adopted.
- 4.49 Women shall be protected against any assault on their dignity, in particular against rape, enforced prostitution or any form of indecent assault.<sup>52</sup> Children shall be protected in particular against any form of indecent assault. The parties to a conflict shall provide children with the care and aid they require, whether due to their age or any other factor.<sup>53</sup> If relief actions are needed to ensure adequate access to food, clothing, shelter and other supplies needed by the civilian population to survive, priority shall be given to children, expectant mothers, maternity cases and nursing mothers.<sup>54</sup>
- 4.50 If women and children are arrested, detained or interned for reasons related to an armed conflict, women shall be kept separate from men and under the immediate supervision of women. Children should be kept separate from adults except where families are accommodated as family units.<sup>55</sup> Expectant and nursing mothers and children who are interned are also entitled to additional food rations in proportion to their physiological needs.<sup>56</sup> Mothers with dependent small children and pregnant women who are arrested, detained or interned for reasons related to an armed conflict shall have their cases considered with utmost priority.<sup>57</sup>

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<sup>51</sup> Geneva Convention III, Article 33.

<sup>52</sup> Geneva Convention IV, Article 27(2).

<sup>53</sup> Additional Protocol I, Article 77(1).

<sup>54</sup> Additional Protocol I, Article 70(1).

<sup>55</sup> Additional Protocol I, Articles 75(5) and 77(4).

<sup>56</sup> Geneva Convention IV, Article 89, fifth paragraph.

<sup>57</sup> Additional Protocol I, Article 76(2).

## EXAMPLE 2: RESPECT FOR WOMEN

All civilians shall be treated with respect. Many cultures practice a clearer distinction between women and men than is usual in Norway, such that respect for women is shown in other ways. For example, it may be important that male strangers do not physically touch a woman, even on the hand, and that men are not alone with women in a room, such as one used for body searches. Affording this form of respect can present practical difficulties. Often, the problem will be solved by having female soldiers available to assist. If that is not possible, it is important, whenever practical and operationally feasible, to avoid contact that may be perceived as offensive.

- 4.51 The parties to a conflict shall take all possible steps to prevent children from participating directly in hostilities (“child soldiers”). In particular, they shall refrain from recruiting children to their armed forces. In Norway, children are defined as persons under the age of 18,<sup>58</sup> although in various other countries the age of majority is 15 years.<sup>59</sup> If children nevertheless participate directly in hostilities and fall into the hands of the enemy, they still benefit from the special protection afforded to children, whether or not they are prisoners of war.<sup>60</sup>



*Women and children are often particularly vulnerable during armed conflict, and must be granted special protection. Photo: Lars Kroken/Norwegian Armed Forces Media Centre.*

<sup>58</sup> *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict* of 25 May 2000, Article 1.

<sup>59</sup> *Rome Statute of the International Criminal Court* of 17 July 1998, Article 8(2)(b)(XXVI).

<sup>60</sup> *Additional Protocol I*, Article 77(3–4).

- 4.52 Children who are orphaned or separated from their parents by war shall not be left to fend for themselves. The parties to a conflict shall take the necessary measures to facilitate their practice of religion and education, and to do what is necessary to ensure that such children receive food, clothing, housing and any necessary medical assistance.<sup>61</sup> Evacuation of children to a foreign country without the consent of their family or guardian may be undertaken only if it is a purely temporary measure due to compelling reasons of the children's health or medical treatment, or for their safety.<sup>62</sup> In the case of non-international armed conflicts, children shall be temporarily evacuated to a safer area when necessary. They shall in such cases be accompanied by persons responsible for their safety and well-being. If possible, the consent of their family or guardian shall be obtained.<sup>63</sup>
- 4.53 All appropriate steps shall be taken to facilitate the reunion of families that are temporarily separated by an armed conflict, not least by supporting humanitarian relief organisations engaged in such work.<sup>64</sup>

### *Special remarks on elderly and disabled persons*

- 4.54 Elderly and disabled persons are entitled to special protection and respect, in common with persons who are sick or injured and with children, expectant mothers and mothers of infants. The need for special protection will vary depending on the situation, but may involve, for example, assisting with evacuation from areas of combat activity.<sup>65</sup>

### *Refugees and internally displaced persons*

- 4.55 Persons who were already considered refugees or stateless before the outbreak of hostilities are entitled to protection and respect in all circumstances. They shall not suffer adverse distinction of any kind, and shall be treated equally on the basis of their needs.<sup>66</sup> Refugees and stateless persons are persons who have fled their own country and are entitled to such status. This may be defined in Norwegian law and by Norway's international obligations, in the domestic legislation of the country that has granted a person refugee or stateless status, or in the national legislation of the country in which the person is present.

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<sup>61</sup> *Geneva Convention IV, Article 24, first paragraph.*

<sup>62</sup> *Additional Protocol I, Article 78.*

<sup>63</sup> *Additional Protocol II, Article 4(3)(e).*

<sup>64</sup> *Additional Protocol I, Article 74; Additional Protocol II, Article 4(3)(b).*

<sup>65</sup> *Geneva Convention IV, Articles 14 and 16; Additional Protocol I, Article (8)(a).*

<sup>66</sup> *Additional Protocol I, Article 73.*

- 4.56 Persons fleeing combat activity who have not crossed an international border are not given refugee status, but are instead regarded as internally displaced persons. Women, children and the elderly generally make up the majority of internally displaced persons, and such persons are entitled to special protection as explained in sections 4.48–53 above. In addition, groups of civilians fleeing an area may present a physical obstacle to military operations, making them particularly vulnerable to the effects of hostilities. If it is known that large crowds are moving through an area of operations, such knowledge must be included in the assessment of how the mission is to be performed.
- 4.57 In all cases where civilians are displaced from their homes, whether as refugees or as internally displaced persons, the parties to the conflict shall take all practical steps to ensure that the civilians have adequate food, drinking water, clothing, hygienic living conditions and protection from the rigours of the climate and the dangers of the armed conflict; families, moreover, are not to be separated. Relief organisations shall be given the opportunity to assist. This is primarily a civilian task, and shall be left to the civilian authorities or civilian relief organisations wherever possible. However, in some situations, civilian parties will be unable to assist, perhaps because the security situation does not permit it or because it is impossible to access the areas in question. In such cases, military forces will be able to play a greater role. The guiding principle for military forces is that they may address humanitarian and law-and-order problems until civilian authorities are able to regain control. In some instances, it may be necessary to establish temporary refugee camps operated by the military, as in Albania and Macedonia (FYROM) in the spring of 1999, when large numbers of Kosovars fled Serbian persecution.
- 4.58 Resolving refugee-related issues is not a military task, but rather a task for relevant civilian parties. Norwegian military commanders have no authority to accept asylum applications. Such cases must be referred to the UN High Commissioner, who will contact the Norwegian authorities as appropriate. This also applies to Norwegian warships that pick up persons in distress at sea in accordance with their obligations under the Convention on the Law of the Sea.<sup>67</sup> Norwegian warships are not Norwegian territory for the purposes of asylum law, and any application for asylum must be submitted to the authorities of the country in which the asylum seekers disembark. In practice, it may be the case that no states in the region are willing to receive the persons in question, an eventuality that could delay the ship's performance of its

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<sup>67</sup> UN *Convention on the Law of the Sea*, Article 98.

mission. If such a problem arises, the Norwegian authorities must be contacted as quickly as possible to ensure a timely solution.

Relations with humanitarian organisations are discussed further in sections 4.69–70 below.

### *Foreign nationals*

- 4.59 Foreign nationals in a territory controlled by a party to a conflict are entitled to leave the territory at the outset of, or during, unless their departure is contrary to the national interests of the state. Examples of this may include men able to bear weapons and persons in possession of information that it is critical for the state to control. If persons are refused permission to leave the area, they are entitled to have such refusal reviewed as soon as possible.<sup>68</sup> If it is absolutely necessary due to security reasons to intern foreign persons, it must be done in accordance with the rules discussed in chapter 6.

### *Journalists*

- 4.60 Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians. They shall be protected as such, provided that they take no action adversely affecting their status as protected civilians, i.e. that they do not commit acts amounting to direct participation in hostilities (see section 3.21 onwards). Journalists may obtain an identity card documenting their status as journalists, issued by the government of the state of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located.<sup>69</sup> Such a card grants no special protection under the law of armed conflict, but could explain why protected civilians choose to be in the vicinity of combat activity, thus reducing any suspicion of direct participation or espionage.
- 4.61 Civilian war correspondents accredited to the armed forces are entitled to the same treatment as other civilians who accompany the armed forces; see sections 4.62–63 below. Such correspondents may be journalists who accompany a unit of an armed group for certain periods – so-called “embedded journalists”. Since they spend considerable amounts of time with the combatants, often under difficult conditions, such journalists should be distinctly aware of circumstances that could cause them to be regarded as direct participants in hostilities and thus lawful targets.

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<sup>68</sup> *Geneva Convention IV, Article 35.*

<sup>69</sup> *Additional Protocol I, Article 79.*

### *Civilians accompanying the armed forces*

- 4.62 Persons who accompany the armed forces without actually being members thereof are civilians and not lawful targets. Examples of such persons include civilian war correspondents, supply contractors and members of labour units or of services responsible for the welfare of the armed forces, such as canteen personnel. Such persons must have the consent of the armed forces they are accompanying, and must have an identity card indicating their status.<sup>70</sup>
- 4.63 In international armed conflicts, persons in this category will be entitled to prisoner-of-war status even though they are not combatant personnel. See further discussion of prisoner-of-war status in chapter 6. Although they will have to be regarded as civilians in a proportionality assessment relating to an attack, it is also recognised that they have accepted a greater risk by staying in the vicinity of lawful targets, and that they must accept the consequences of this decision.

### *Civilian civil defence personnel in international armed conflicts*

- 4.64 Civilian civil defence personnel and units shall be respected and protected. They have a right to perform their civil defence tasks except in case of imperative military necessity.<sup>71</sup> This rule is only applicable in international armed conflicts.
- 4.65 Civil defence is the exercise of some or all of the humanitarian tasks mentioned below to protect the civilian population against the dangers associated with hostilities or disasters, and to help the civilian population overcome the immediate effects of hostilities or disasters. A further aspect of civil defence responsibilities is to facilitate the survival of the civilian population. Civil defence tasks include:
- i. warning
  - ii. evacuation
  - iii. management of shelters
  - iv. management of blackout measures
  - v. rescue
  - vi. medical services, including first aid, and religious assistance
  - vii. fire-fighting
  - viii. detection and marking of danger areas

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<sup>70</sup> *Geneva Convention III, Article 4(A)(4).*

<sup>71</sup> *Additional Protocol I, Article 62(1).*

- ix. decontamination and similar protective measures
- x. provision of emergency accommodation and supplies
- xi. emergency assistance in the restoration and maintenance of order in distressed areas
- xii. emergency repair of indispensable public utilities
- xiii. emergency disposal of the dead
- xiv. assistance in the preservation of objects essential for survival
- xv. complementary activities necessary to carry out any of the tasks mentioned above, including, but not limited to, planning and organisation<sup>72</sup>

- 4.66 Civilian civil defence personnel are entitled to protection as long as they do not engage in acts, outside their proper tasks, harmful to the enemy. They must be given advance warning if protection is to be withdrawn. It shall not be regarded as harmful to the enemy if civilian civil defence personnel, carrying out civil defence tasks, are under the direction or control of military authorities, or if they cooperate with military personnel in the performance of civil defence tasks. Moreover, civilian civil defence personnel do not lose their protected status even if the performance of such tasks occasionally benefits military victims, including those who are *hors de combat*. Civilian civil defence personnel are entitled to carry light individual weapons for the purpose of maintain order or for self-defence.<sup>73</sup>
- 4.67 In some countries, the civil defence services are organised as part of the military. Military civil defence personnel will also be entitled to protection, provided that they are exclusively used to perform civil defence tasks. In addition, they must be clearly identified as civil defence personnel, bearing only light individual weapons and not undertaking acts harmful to the enemy. If captured, they are entitled to prisoner-of-war status.<sup>74</sup>

### ***Parlementaires***

- 4.68 *Parlementaires* are envoys authorised to negotiate with the enemy on behalf of a belligerent party, and present themselves bearing a white flag.<sup>75</sup> *Parlementaires* are protected persons, and shall not be object of attack. The party displaying the white flag is obliged to cease fire, while the enemy is only obliged not to fire on the person bearing the flag and persons accompanying him.

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<sup>72</sup> *Additional Protocol I, Article 61(a).*

<sup>73</sup> *Additional Protocol I, Article 65.*

<sup>74</sup> *Additional Protocol I, Article 67.*

<sup>75</sup> *Hague Convention IV, Article 32.*



## *Relief personnel*

- 4.69 Where there is need for a relief action to supply the civilian population with items such as food and medicines, personnel involved in such a relief action shall be respected and protected.<sup>76</sup> The safety of such personnel is vital in order for the civilian population to receive the assistance it requires. Among other things, personnel participating in relief actions shall enjoy special protection against harassment, threats and arbitrary security detention. Only in cases of imperative military necessity may the activities of relief personnel be limited or their freedom of movement temporarily restricted.<sup>77</sup>
- 4.70 The presence and involvement of such personnel in relief actions requires the consent of the party concerned with control of the territory in which such personnel are to perform their duties.<sup>78</sup>

## *Symbols of protection for persons (distinctive emblems)*

- 4.71 It is not the symbol itself which confers protection, but certain symbols indicate that the status of the person bearing it requires that he or she are entitled to protection and respect. Protected persons do not lose such protection if they are not bearing the distinctive emblem, although this will make it difficult for the enemy to know that the person is entitled to protection, particularly if he or she is wearing a military uniform. That is why a requirement exists that protected persons be marked.

Misuse of distinctive emblems may constitute perfidy; see chapter 8 on methods of warfare.

- 4.72 Symbols of protection include:

a. *Red Cross, Red Crescent and Red Crystal*

For further discussion of medical personnel, religious personnel and others who bear these emblems, see chapter 5.

b. *White flag*

A white flag indicates negotiation, not surrender. A person carrying a white flag should nevertheless in principle be permitted to approach on his errand, whether relating to surrender or some other issue.

Examples of the various protective symbols can be found in chapter 7, on protected objects.

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<sup>76</sup> *Additional Protocol I, Article 71(2).*

<sup>77</sup> *Additional Protocol I, Article 71(3).*

<sup>78</sup> *Additional Protocol I, Articles 71(1) and (3); Additional Protocol II, Article 18(2).*

## Special comments on peace support forces

- 4.73 Personnel forming part of peace support forces will be protected persons if, and for as long as, they do not participate in hostilities. They will be entitled to the same protection as civilians who do not participate directly in hostilities. The difference between peacekeeping and peace enforcement operations is described in greater detail in section 1.48. In short, personnel deployed on peacekeeping operations are a neutral third party in a conflict, whereas personnel deployed on peace enforcement operations will generally be participants in an armed conflict. Often, peacekeeping forces wear a blue helmets to signal that they are a peacekeeping force under the command of and operating under a mandate from the UN. The blue helmet is designed to make it easier to see that persons wearing it should not be attacked.<sup>79</sup>



*A Norwegian UN soldier on patrol in Lebanon in 1998. Since the establishment of UNIFIL in 1978, about 22,000 Norwegian soldiers have participated in the peacekeeping force. Photo: Torbjørn Kjosvold/Norwegian Armed Forces Media Centre.*

- 4.74 If personnel forming part of peacekeeping or peace enforcement forces participate directly in hostilities, they may become party to the conflict irrespective of the mandate for the operation. In such cases, they will lose their right to protection as civilians and, depending on the type of conflict, may become lawful targets (see chapter 3).

## National information bureau

- 4.75 As soon as an armed conflict has commenced, both parties shall establish an official information bureau. The information bureau shall be responsible for accepting and forwarding information about protected persons who are in the power of a party to the conflict. Parties to the conflict shall send information to this bureau about the measures taken with respect to any person held in custody for more than two weeks, placed in an assigned residence, or interned. Affected service branches shall send the bureau information about any

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<sup>79</sup> *Convention on the Safety of United Nations and Associated Personnel of 9 December 1994, particularly Article 7.*

changes such as transfers, releases, repatriations, escapes, admittances to hospital, births and deaths.<sup>80</sup>

- 4.76 The bureau shall send information to the state of origin of such persons, either directly or through a central bureau operated by the ICRC or any protecting power, and shall reply to questions directed to the bureau about protected persons. The information shall be of such a character as to make it possible to identify the protected person exactly, and to quickly advise his or her family.<sup>81</sup>
- 4.77 The following information shall be included:<sup>82</sup>
- i. surname and first names
  - ii. place and date of birth
  - iii. nationality
  - iv. last residence
  - v. distinguishing characteristics
  - vi. the first name of the father and the name of the mother
  - vii. date, place and nature of the action taken with regard to the individual
  - viii. address where correspondence may be sent to him or her
  - ix. name and address of person to be informed
  - x. information on the health of internees who are seriously ill or seriously wounded, to be supplied regularly and if possible every week
- 4.78 The information bureau shall also assemble all personal valuables left behind by protected persons whom the conflict party had in its power.<sup>83</sup>
- 4.79 When Norway is involved in an international armed conflict, the Norwegian national information bureau for prisoners of war will normally begin operating. This is an office whose function is to register and maintain an overview of prisoners of war in Norwegian custody and to procure information about Norwegian prisoners held by the enemy. The Norwegian national information bureau is the responsibility of the Norwegian Red Cross under an agreement with the Ministry of Defence.

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<sup>80</sup> *Geneva Convention IV, Article 136.*

<sup>81</sup> *Geneva Convention IV, Articles 137–138.*

<sup>82</sup> *Geneva Convention IV, Article 138.*

<sup>83</sup> *Geneva Convention III, Article 122, ninth paragraph; Geneva Convention IV, Article 139.*



## 5

# Medical services and the protection of sick, injured, shipwrecked and dead persons

## Introduction

- 5.1 This chapter discusses the definition of medical personnel and how medical service equipment, transport and buildings may be used, the conditions under which one may lose protection from attack, and marking requirements. It also covers the obligations of the enemy with respect to injured, sick, shipwrecked and dead persons. The Chief of Defence has issued a separate directive on compliance with certain international law obligations relating to medical services.<sup>1</sup> Most of the provisions in the directive are discussed in this chapter.
- 5.2 Medical units, medical transportation and medical personnel (“medical services”) shall be respected and protected at all times. They shall not be the objects of attack.<sup>2</sup> However, medical personnel situated in or around a combat unit have to accept the risk associated with being in the vicinity of a lawful target. Medical personnel may not be subjected to superfluous injury or unnecessary suffering under any circumstances.<sup>3</sup> Nor may they be unnecessarily hindered in their work.
- 5.3 Military medical services perform a military function. The treatment of sick and injured persons allows a significant proportion of such persons to regain their combat ability and rejoin their units at a later date. A well-functioning medical service will also help to raise morale among combatants by giving them a reasonable prospect of surviving even if they are hit by enemy fire. In this way, the performance of medical tasks is indirectly harmful to the enemy. When balancing military necessity and humanitarian considerations, however, the view has been taken that humanitarian considerations should prevail and that the protection accorded to medical services may only be terminated if the

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<sup>1</sup> *Direktiv om etterlevelse av enkelte folkerettsforpliktelser vedrørende saniteten* [Directive concerning compliance with certain public international law obligations relating to medical services], 18 August 2010, (the Medical Services Directive).

<sup>2</sup> *Additional Protocol I, Article 12.*

<sup>3</sup> *Additional Protocol I, Article 35(2).*

services are used to undertake, outside their humanitarian function, acts harmful to the enemy. Even then, protection will only cease after warning has been given that the protection will cease and the harmful activity continues anyway.<sup>4</sup>

## Medical personnel

- 5.4 Medical personnel protected under the law of armed conflict can be divided into the following three groups:
- i. military medical personnel exclusively engaged in medical tasks<sup>5</sup>
  - ii. civilian medical personnel belonging to a party to a conflict who assist the military service of the armed forces or civil defence organisations<sup>6</sup>
  - iii. medical personnel made available to a neutral state, a relief organisation in such a state, or by an impartial international humanitarian organisation

Such medical personnel have in common that they shall engage exclusively in humanitarian tasks. “Exclusively” means that medical personnel shall not be ordered to perform, or actually perform, activities that could be harmful to the enemy; see further discussion in section 5.11 onwards.

- 5.5 If medical personnel fall into the hands of the enemy, they do not receive prisoner-of-war status. However, medical personnel may be retained for as long as necessary in consideration of the treatment needs of prisoners of war. They will then have the status of “retained personnel” (see section 6.18). Medical personnel who do not have to be retained for the treatment of prisoners of war shall be repatriated, i.e. returned to their home state, if necessary via a neutral state. Retained medical personnel shall be treated at least as well as prisoners of war.

### *Military medical personnel performing exclusively medical tasks*

- 5.6 Military medical personnel are civilian or military personnel attached to the armed forces, in one of the following three sub-categories:

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<sup>4</sup> *Additional Protocol I, Article 13.*

<sup>5</sup> *Geneva Convention I, Article 24.*

<sup>6</sup> *Geneva Convention I, Article 26.*

- i. Personnel engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, typically including doctors, nurses, dentists, ambulance drivers, personnel at blood transfusion centres, stretcher bearers, chemists and other personnel providing medical support to sick and injured persons.
- ii. Administrative personnel engaged in managing medical personnel and medical facilities without being directly involved in the treatment of sick and injured persons. This category includes, by way of example, managers of the armed forces' health and medical services, persons working with medical unit staff development, including education and training of medical personnel, persons who plan medical care in operations and cooks attached to a medical service.
- iii. Religious personnel. The rules applicable to medical personnel apply to religious personnel to the extent suitable. "Religious personnel" refers to military or civilian persons such as army chaplains exclusively engaged in the performance of their ministry and attached to the armed forces or medical units.<sup>7</sup> This category of personnel is also referred to as "clergy".

### *Civilian medical personnel supporting the armed forces*

- 5.7 Personnel from national Red Cross associations and other voluntary relief associations as well as personnel at civilian hospitals may be used by the authorities to support their armed forces during an armed conflict. Such use shall be announced to the enemy. Such personnel shall be subject to military laws and regulations.<sup>8</sup>

### *Veterinarians*

- 5.8 Veterinarians forming part of medical units who exclusively perform medical tasks as mentioned in section 5.6 will be included in the category of medical personnel, as are the medical unit's cooks, mechanics and other support personnel. An example of a medical task veterinarians may perform in their capacity as protected personnel is preventive health care. Veterinarians working with CBRN (chemical, biological, radiological, nuclear), food safety, animal health or other tasks harmful to the enemy do not enjoy protection as medical personnel and are regarded as combatants. However, a medical unit or medical installation will not lose its protection even if combatant veterinarians

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<sup>7</sup> *Additional Protocol I, Article 8(d).*

<sup>8</sup> *This follows from the Military Penal Code and the Military Disciplinary Code.*

are present.<sup>9</sup> Veterinarians engaged not only in animal health matters but also other combatant tasks and medical tasks such as active health care shall have the status of combatant personnel and may not bear a protective emblem.



*Specially trained dogs searching for undetonated munitions at Hjerfoss firing range. Treatment of such dogs is a combatant function.*  
*Photo: Simen Rudi/Norwegian Armed Forces Media Centre.*

## Prohibition against activities that may be harmful to the enemy

### *General rule*

- 5.9 It is a fundamental principle that medical personnel shall not be ordered, or used, to undertake acts harmful to the enemy. This is closely related to the fact that medical service personnel are not lawful combatants, and shall therefore not participate directly in hostilities. It may be argued that treating sick and injured persons so that they can return to the battlefield will indeed be harmful to the enemy. However, this is not a persuading argument, and there is no doubt that a medical service retains its protection as long as it restricts itself to performing humanitarian tasks.
- 5.10 Using a protective emblem in combination with performing activity that may be harmful to the enemy may be regarded during armed conflict as perfidy, and be prosecuted as a possible war crime. The prohibition against perfidy is discussed further in sections 9.23–25.

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<sup>9</sup> Geneva Convention I, Article 22(4).



## *Acts harmful to the enemy*

- 5.11 Although there is no clear definition of the kinds of activities which are regarded as harmful to the enemy, in principle medical personnel shall not be used for tasks going beyond the scope of their humanitarian assignment. Some examples will be provided here of activities and situations which will not be regarded as harmful to the enemy, as well as examples of prohibited activities. In addition, various scenarios will be discussed separately.
- 5.12 A frequently debated activity is the contribution of medical personnel to guarding and protecting their unit. Medical personnel generally shall not be ordered as armed guards, except for the purpose of guarding the medical service or the sick and injured persons in their care. In such cases, special sentry instructions shall be drafted to ensure compliance with the specific rules of international law applicable to medical personnel. Note that further exceptions from the general rule may be made for sentry duty during peacetime in Norway.<sup>10</sup>
- 5.13 The following shall not be regarded as acts harmful to the enemy:<sup>11</sup>
- that the personnel of the unit are armed and may use their arms in their own defence or in that of the wounded and sick in their charge
  - that the unit is protected by sentries or an escort
  - that small arms and ammunition taken from injured and sick persons and not yet handed to the proper authority are found in the unit
  - that members of the armed forces or other combatants are present in the unit for medical reasons (including for such procedures as medical examinations and vaccination)
  - that a medical service performs sentry duty for its own installation

Further discussion of these factors is provided from section 5.17 onwards.

- 5.14 Examples of activities that are regarded as harmful to the enemy:
- giving shelter to healthy combatant personnel
  - storing weapons or ammunition in excess of what medical personnel are permitted to use

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<sup>10</sup> *Medical Services Directive, point 5.*

<sup>11</sup> *Geneva Convention I, Article 22; Additional Protocol I, Article 13(2).*

- using medical vehicles to transport weapons or healthy combatant personnel, supplies, etc. for combat forces
- using medical installations or medical personnel to shield military operations or lawful targets
- undertaking sentry duty other than for one's own medical installation

5.15 For a detailed description of acts regarded as harmful to the enemy, and thus entailing the loss of protection, see the description of “direct participation in hostilities” in section 3.21 onwards. The acts defined there as direct participation in hostilities will also constitute acts harmful to the enemy. If they take such actions, medical personnel will no longer be entitled to their special protection status.

#### EXAMPLE 1: INFORMATION COLLECTION

Imagine that you are serving as a medical orderly and driver of a Sisu medical service vehicle for a medical troop in an armed conflict somewhere in the world. You and the rest of your team are ordered to drive from the field hospital where you are currently deployed to the front line to relieve another team from your troop which has been deployed to a forward relief position. On the way, you have to navigate a mountain pass which is known to be frequently booby-trapped with IEDs by rebel forces (your enemy). Moreover, the enemy has on occasion conducted ambushes there. Just before you begin descending from the pass, a colleague spots what he believes to be a rebel force of around eight to 10 persons on a ridge approximately 500 metres away. You stop your vehicle and quickly conclude that this is a group of armed insurgents in uniform, but that they do not present a threat to you. The problem is therefore whether you can report what you have seen to the command post to inform them of enemy activity, or whether this could be defined as an act harmful to the enemy. You know that the likely outcome of this report is the deployment of ground forces or aircraft to neutralise the rebel group.

In this instance, you have been deployed on an ordinary medical assignment and have discovered enemy activity “by chance”. The question is whether you are free to report such activity without being said to engage in an act harmful to the enemy.

“Passive” gathering of information must be permitted for medical orderlies, even though this can clearly be said to be harmful to the enemy. However, the medical orderlies in this scenario have not been deployed with the aim of engaging in activities harmful to the enemy. Ordering a medical orderly to engage in active information collection focused on the enemy will not be permitted.

### *Loss of protection and requirement of warnings*

- 5.16 If medical personnel engage in acts harmful to the enemy outside their humanitarian function, the protection they ordinarily enjoy as medical personnel will cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded. It is the commanding officer who wishes to withdraw the medical service's protection who is responsible for warning the enemy. This warning is important because it offers an opportunity to clarify any misunderstandings and ensure that attacks on such specially protected persons and objects only occur as a last resort. In order for the warning to be effective, the enemy must be given a genuine opportunity to comply with the demand. Accordingly, when appropriate, a reasonable time-limit shall be specified for complying with the demand.<sup>12</sup> An example of a situation in which there is no time for a warning is when a unit approaches a medical installation and comes under fire from it.

### *Arming of medical personnel and the use of force*

- 5.17 Medical personnel are permitted to use force, including deadly force if necessary, to defend themselves, other medical personnel and wounded and sick persons. They may therefore be equipped with personal weapons.



*A medical orderly equipped with a personal weapon and an approved protective emblem attached with velcro. Photo: Norwegian Armed Forces Joint Medical Service.*

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<sup>12</sup> Additional Protocol I, Article 13.

### *Individual weapons*

- 5.18 Medical personnel may be equipped with and use individual weapons such as pistols, machine pistols, guns and rifles.<sup>13</sup> Medical services shall not be equipped with unit weaponry, typically MG-3 machine guns, or other heavy weaponry. The decisive criterion in determining whether a weapon is individual is that a single person must be able to transport and operate it. However, this does not mean that a personal weapon may simply be mounted onto a vehicle. Before any weapon is mounted to a vehicle, the Ministry of Defence must undertake a specific assessment based on international law.

### *Use of force in self-defence by medical personnel*

- 5.19 This section contains more detailed discussion of the right of self-defence as applicable specifically to medical personnel. The right of self-defence applies generally, and is discussed in detail in sections 14.48–54. Medical personnel are entitled to defend only themselves and their patients. Accordingly, medical personnel have no right to act in self-defence to defend personnel, units or materials which are not medical in nature or subject to the protection of a medical service, such as lawful combatants. The right of self-defence of medical personnel and units is designed for situations in which a unit suffers pillage, criminal acts or direct attacks by the enemy.<sup>14</sup> The right of self-defence may be used only against unlawful acts. This means, for example, that a medical service may not use force in self-defence in order to prevent the enemy from lawfully attempting to take control of a medical unit.
- 5.20 If, in a self-defence situation, medical personnel use weapons, which for other reasons are available, to obtain an effective self-defence, they will not lose the protection to which they are entitled even if these weapons cannot be considered individual weapons as defined in section 5.18. It is not permitted for medical services to plan for such use of weapons. Medical personnel are thus not permitted to carry weapons which in general are prohibited in medical vehicles with the intent of using them in a potential self-defence situation.

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<sup>13</sup> *Geneva Convention I, Article 22; Additional Protocol I, Article 13(2)(a) (Article 13 applies to civilian medical units, but the ICRC commentary on the article make it clear that corresponding restrictions must apply to military medical units); the Medical Services Directive, point 4.*

<sup>14</sup> *Additional Protocol I, Article 13.*

## Medical units – medical service buildings and material

### *Definition of medical units*

- 5.21 “Medical unit” means an establishment or other unit, whether military or civilian, organised for medical purposes, namely the search for or collection, transportation, diagnosis or treatment – including first-aid treatment – of wounded, sick and shipwrecked persons, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.<sup>15</sup>

### *Armed sentries*

- 5.22 It is permitted to use combat units, including vehicles, to protect and/or secure a medical service and wounded and sick persons; it is also permitted to use military or other sentries to protect against theft and looting. Whether this is appropriate must be determined by the officer in charge of the operation on the basis of an overall assessment of the advantages and disadvantages of such protective measures. Among other things, the assessment must cover whether such protective and/or security measures will increase the likelihood of the enemy defining the medical service as a lawful target. The presence of security forces does not, in other words, turn a medical service into a lawful target, but the fact that a security force is a lawful target could put medical personnel at risk; see section 5.24.
- 5.23 Medical services and wounded and sick persons will not lose their protection as a result of accompanying units or guards that are equipped with or using heavier weaponry than medical personnel are permitted to carry.

### *The presence of combatant personnel in medical units*

- 5.24 Medical units and medical installations will usually be visited by combatant personnel, not only for health reasons, but also, for example, in connection with such activities as inspections. As such, this will not remove the protection enjoyed by a medical unit, although medical services must be aware that combatants are always lawful targets for the enemy. If the number of combatants in attendance becomes high, the enemy may consider an attack on them as lawful, even if injury/damage is expected to medical personnel, patients and/or material.

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<sup>15</sup> *Additional Protocol I, Article 8(e).*

## *The presence of weapons and ammunition in medical units*

- 5.25 A medical service does not lose its protected status due to the presence of weapons and ammunition that belong to wounded or sick persons but have not yet been removed due to time-related reasons. Medical services shall deliver weapons and ammunition into the charge of another unit as soon as possible.

## *Camouflaging of medical units*

- 5.26 Medical units shall only be camouflaged in exceptional cases and when necessary on imperative operational grounds. Such grounds may include the need to hide the presence or deployment of forces in an area to prevent tactical operations from being compromised. Accordingly, camouflage will generally be relevant where medical units are located close to the front.<sup>16</sup>
- 5.27 Authority to camouflage medical units rests with the brigade commander or correspondingly. Orders to camouflage medical units shall be limited in time and restricted to a specific area. Camouflage should be removed if there are indications that the unit has been discovered and the purpose of the camouflage has lapsed. In such cases, it will be in the medical unit's own interest to demonstrate as clearly as possible that it is entitled to protection, in order to avoid attack.
- 5.28 The camouflaging of medical units will not cause them to lose their protected status. However, camouflage will naturally make such units more vulnerable to attack if discovered, since the enemy will not have the same opportunity to verify that they are medical units.
- 5.29 Even if a medical unit is camouflaged, it shall engage only in activities which are not harmful to the enemy; see sections 5.11–15.

## **Medical transportation**

### *In general*

- 5.30 “Medical transportation” means transportation by land, water or air of wounded, sick and shipwrecked persons, medical personnel, religious personnel, medical equipment or medical supplies.<sup>17</sup> Civilian medical transports are also included.<sup>18</sup>

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<sup>16</sup> NATO STANAG 2931 (version 2). This STANAG has not been ratified by Norway. Version 3 is under development. As of 29 November 2012, it has not been ratified.

<sup>17</sup> Additional Protocol I, Article 8(f).

<sup>18</sup> Additional Protocol I, Article 21.

5.31 Medical vehicles, medical aircraft and hospital ships may only be used for the following activities:

- evacuation and treatment of sick, wounded and shipwrecked persons
- transportation of medical material, or
- transportation of medical personnel



*Evacuation of a wounded soldier during the Flotex Silver Rein exercise in 2012. Evacuation and treatment of sick and injured persons is an example of an activity in which medical vehicles may be used. Photo: Torbjørn Kjosvold/Norwegian Armed Forces Media Centre.*

5.32 It is impermissible to switch between protected and combatant status. For example, if medical personnel have removed the distinctive emblems from a medical vehicle and driven it to an airport to fetch combatants returning from leave, the distinctive emblems may not be replaced until there is a change of contingent or similar rotation.<sup>19</sup> The term “similar” was added to the Medical Services Directive as a “safety valve”. A key factor in the assessment of whether a similar situation exists is whether a sufficient period of time has passed to say that personnel are not switching from and to protected status and that there is continuity in the classification of personnel. International law

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<sup>19</sup> *Medical Services Directive, point 3.*

permits distinctive emblems on material – for example vehicles, ships and aircraft – to be removed and replaced in greater measure than such markings on persons, but for Norwegian forces no distinction is made between persons and material in this context. Nevertheless, it is important to be aware that other states may adopt different practices relating to the marking of materiel. For further discussion of medical service markings, see section 5.42 onwards.

### *Medical aircraft*<sup>20</sup>

- 5.33 Medical aircraft are aircraft employed exclusively for the evacuation and treatment of wounded, sick and shipwrecked persons and for the transport of medical personnel and medical materiel. Medical aircraft may also be used to search for one's own wounded and sick personnel in territory controlled by the enemy, if agreed in advance. Medical aircraft shall not be the object of attack.
- 5.34 Medical aircraft may not be used to acquire a military advantage over the enemy. For example, medical aircraft shall not be used to gather or forward intelligence data, and shall not carry equipment intended for such purposes. The presence of medical aircraft shall not be used in an attempt to render lawful targets immune from attack, i.e. as a shield. Medical aircraft may employ encrypted communications, but these shall not be used to pass on intelligence information or otherwise be used in activities harmful to the enemy.<sup>21</sup>
- 5.35 Medical aircraft may fly over land areas controlled by their own or friendly forces, as well as territorial seas which are not controlled by the enemy.<sup>22</sup> However, the enemy should still be notified if it is likely that such flights may come within range of its weapons systems.
- 5.36 Flights over areas controlled by the enemy, or areas the physical control of which is not clearly established, shall only take place as agreed with the enemy. Except where a prior agreement has been concluded with the adversary, medical aircraft flying over such areas shall not be used to search for wounded, sick and shipwrecked persons. Medical aircraft flying over such areas may be ordered to land or to alight on water to permit inspection. Inspection shall be commenced without delay and be conducted expeditiously. The inspecting party shall not require the wounded and sick to be removed from the aircraft unless their removal is essential for the inspection. The inspecting party shall in

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<sup>20</sup> *Geneva Convention I, Article 36; Geneva Convention II, Article 39; Additional Protocol I, Articles 24–31.*

<sup>21</sup> *Additional Protocol I, Article 28.*

<sup>22</sup> *Additional Protocol I, Article 25.*



any event ensure that the condition of the wounded and sick is not adversely affected by the inspection or removal.<sup>23</sup>

- 5.37 If the inspection discloses that the aircraft does not meet the conditions requiring protection as a medical aircraft, it may be seized. The same applies if the aircraft has violated its obligations as a medical aircraft or has flown without or in breach of a prior agreement. The occupants of the aircraft shall be treated in accordance with the rules on the treatment of prisoners (see chapter 6), and any sick and injured persons aboard must be given the treatment they require. Any seized aircraft which has been used as a permanent medical aircraft may thereafter only be used as a medical aircraft.<sup>24</sup>
- 5.38 Medical aircraft shall not fly over or land in the territory of neutral states unless agreed in advance or done in exercise of the aircraft's right of free transit passage through straits used in international navigation, or in exercise of the right to pass through archipelagic sea lanes.<sup>25</sup> For further discussion of international straits and archipelagic sea lanes, see chapter 10, on maritime operations.

### *Hospital ships and other medical and rescue vessels*

- 5.39 Military hospital ships<sup>26</sup> are ships that a party to a conflict has constructed or equipped especially and exclusively for the purpose of bringing relief to, caring for and transporting wounded, sick and shipwrecked persons. Hospital ships may never be attacked or captured, and shall be respected and protected at all times. To ensure such respect and protection, the names and descriptions of relevant ships must be conveyed to the conflict parties 10 days before they are used as hospital ships. Hospital ships shall afford relief and assistance to wounded, sick and shipwrecked persons without distinction of nationality.<sup>27</sup>

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<sup>23</sup> *Additional Protocol I, Article 30.*

<sup>24</sup> *Additional Protocol I, Article 30.*

<sup>25</sup> *UN Convention on the Law of the Sea of 10 December 1982, Articles 38(1) and 53(1–3).*

<sup>26</sup> *Geneva Convention II, chapter III.*

<sup>27</sup> *Geneva Convention II, Article 30.*



*MS Fjordkongen bearing distinctive emblems during the Cold Response exercise in 2007. The vessel played the role of an ambulance boat. Civilian vessels redesignated as medical vessels in an armed conflict may only be used to bring relief to injured, sick and shipwrecked persons, and to care for and transport them. Photo: Naval Medical Service.*

- 5.40 Military hospital ships may employ encrypted communications, although these may not be used to pass on intelligence information or otherwise be used in activities harmful to the enemy.<sup>28</sup>
- 5.41 Civilian hospital ships (for example operated by the Red Cross) and any military or civilian hospital ships placed at the disposal of a neutral state are entitled to the same protection as hospital ships belonging to the belligerent parties.<sup>29</sup> The same applies to other vessels used by a state or officially recognised relief association for coastal rescue operations.<sup>30</sup> In this context, “coastal rescue operations” means the rescue of personnel, and excludes the salvage of the vessels.

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<sup>28</sup> *Geneva Convention II, Article 34; San Remo Manual on International Law Applicable to Armed Conflict at Sea, 12 June 1994, paragraph 171.*

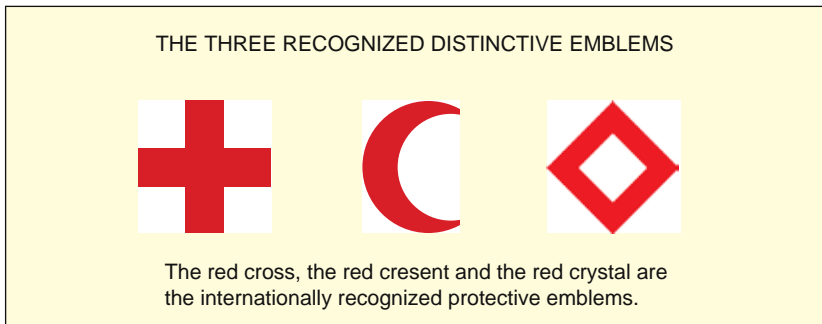
<sup>29</sup> *Geneva Convention II, Article 25; Additional Protocol I, Article 22.*

<sup>30</sup> *Geneva Convention II, Article 27.*

## Marking with distinctive emblems

### *In general*<sup>31</sup>

- 5.42 The recognised distinctive emblems are the red cross, the red crescent and the red crystal, all on a white background.<sup>32</sup>
- 5.43 A red cross on a white background is an internationally recognised symbol for protected medical and religious personnel, medical units, facilities, transportation and activities. The cross is based on the Swiss flag, and should not be assumed to have a religious meaning. However, it has been interpreted as a symbol of Western Christianity. Muslim countries therefore often use a red crescent on a white background. In 2005, the red crystal was recognised as a third symbol, for use in the same way as the red cross/crescent.<sup>33</sup>



- 5.44 Norway generally uses a red cross on a white background.<sup>34</sup> However, Norwegian forces may use other distinctive emblems (red crescent or red crystal) if specifically ordered to do so by Norwegian Joint Operational Headquarters.

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<sup>31</sup> *Additional Protocol I, Article 18.*

<sup>32</sup> *Geneva Convention I, Article 38; Geneva Convention II, Article 41; Additional Protocol I, Article 8(l); Additional Protocol II, Article 12; Additional Protocol III, Article 2(2).*

<sup>33</sup> *Additional Protocol III.*

<sup>34</sup> *Medical Services Directive, point 3.*

- 5.45 Distinctive emblems shall be used to identify medical personnel and clergy, medical units and transportation, and medical equipment.<sup>35</sup> The size of the markings or emblems depends on the circumstances. Since the primary purpose of markings is to ensure visibility to enemy troops, the size of markings will be governed by what will ensure sufficient visibility, and thus protection of the medical service, in the circumstances. Wherever possible, distinctive emblems must be worn in such a manner that they will also be visible when technical means of identification are used as well as at night, in reduced visibility, and from the air.
- 5.46 The international bodies of the Red Cross (the committee and the federation) and their personnel shall always be permitted to use the red cross symbol on a white background. In peacetime, distinctive emblems may also be used by national Red Cross/Red Crescent/Red Crystal units, international Red Cross units and their personnel. Use of the red cross symbol for indicative purposes must not be confused with the use of the red cross for protective purposes as described in section 5.45 above. The use of the red cross symbol for indicative purposes is intended to demonstrate the connection with the Red Cross movement, rather than to claim protection under the law of armed conflict. This is of particular significance to the size of the emblem: when the logo is used for indicative purposes, the red cross must be relatively small, and is often accompanied by the name of the national association or something similar. In special cases, a distinctive emblem may be used in peacetime to identify ambulances and relief stations that exclusively offer free treatment to the wounded and sick.<sup>36</sup> Such exceptions require the approval of the national Red Cross association.
- 5.47 Distinctive emblems shall always retain their original form, and nothing shall be added to either the red cross (or red crescent or red crystal) or the white background. Nor shall other forms of emblem or markings be used. It is not permitted to use more than one distinctive emblem simultaneously.

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<sup>35</sup> *Geneva Convention I, Articles 39–43; Geneva Convention II, Articles 41–43; Geneva Convention IV, Article 18, third and fourth paragraphs, Article 20, second and third paragraphs, Article 21 and Article 22(2); Additional Protocol I, Article 18; Additional Protocol II, Article 12; Additional Protocol III, Article 2.*

<sup>36</sup> *Geneva Convention I, Article 44; Additional Protocol III, Article 3.*

## *Removal of markings*

- 5.48 Failure to mark medical personnel, religious personnel, medical units or medical transportation does not cause them to lose their protected status, although it will necessarily cause difficulties in identifying who is and is not entitled to protection. The parties have a duty to refrain from attacking if there is significant doubt as to whether an unmarked unit is a medical unit. The same applies to personnel and transportation.
- 5.49 Norwegian Joint Operational Headquarters may issue specific orders to remove an emblem. This may occur in situations where it is clear the enemy is not respecting the emblem and the medical service therefore requires alternative protection in the form of heavier weaponry. It may also occur when there are clear indications that the enemy is deliberately attacking clearly marked medical personnel/medical installations/medical transportation. This was the reason, for example, for the Chief of Defence's order in the autumn of 2011 to remove markings from certain mobile evacuation units in Afghanistan.
- 5.50 If the removal of an emblem is ordered, it may not be replaced until there is a change of contingent or similar rotation; see also section 5.32.<sup>37</sup> Even if markings are removed, a medical service will remain entitled to protection, although it will of course be harder for the enemy to see this. Protection is conditional upon the medical service continuing to perform exclusively medical tasks, and no acts harmful to the enemy. If markings are removed and the medical service is equipped with heavier weaponry than individual weapons, the personnel must be redesignated as combatants, and protected status will cease. Military identity cards must then be issued to replace existing medical identity cards, which must be returned.



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<sup>37</sup> *Medical Services Directive, point 3.*

### *Marking of personnel*

- 5.51 Medical personnel shall generally wear an approved distinctive emblem on the upper part of their left arm. Norwegian forces wear a red cross on a white background, unless ordered otherwise. Currently, Norwegian forces most commonly use an approved velcro emblem measuring 8.5 x 8.5 cm. Markings shall be stamped/marked with the Norwegian Armed Forces logo. This logo is woven into Norwegian velcro emblems during production. Protective emblems are worn on field uniforms and otherwise when it has been decided that protected status shall be indicated. Provisions relating to different types of markings and how the markings shall be fastened and worn are determined by the Chiefs of the Army, Air Force, Navy and Home Guard in their uniform regulations. Other parts of the medical service shall be marked with the same protective emblem.
- 5.52 In addition to a distinctive emblem, medical personnel shall carry a special identity card. If Norwegian Joint Operational Headquarters orders the distinctive emblem to be removed due to a need for heavier weaponry, or that the medical service shall be redesignated because there is a need for it to carry out other tasks considered to be harmful to the enemy, this identity card shall also be withdrawn and medical orderlies shall be redesignated as combatants.

### *Marking of installations*

- 5.53 Medical installations shall be clearly marked with a distinctive emblem. In the case of Norwegian forces, this is a red cross on a white background. Both stationary and mobile installations shall be marked. Examples include fixed installations, relief stations, medical wards, field hospitals, medical staff and training centres. Markings shall face all directions with suitable flags or tarpaulins bearing the mark. Markings may also be painted, where appropriate. Wherever possible, markings must also be visible when technical means of identification are used as well as at night, in reduced visibility, and from the air. Illumination of markings must also be considered, and the size of each symbol should be adjusted to ensure maximum visibility of markings from the air.

### *Marking of vehicles*

- 5.54 Military medical vehicles shall be marked with a distinctive emblem, i.e. a red cross on a white background in the case of Norwegian forces. Marks shall be placed in such a way that they are highly visible from different angles, including from the air.

### *Marking of medical aircraft*

- 5.55 Medical aircraft shall be marked with a distinctive emblem that is highly visible to other parties, i.e. underneath, on top and on the sides. Norwegian medical aircraft shall use a red cross on a white background. See also section 11.9 for further discussion of military aircraft markings in general.

## **Treatment of prisoners of war**

- 5.56 As described in section 5.6, medical personnel who fall into enemy hands may not be held as prisoners of war, but may nevertheless be retained for as long as necessary to meet the treatment needs of prisoners.<sup>38</sup> Treatment priorities shall be determined only through medical assessment. Medical personnel shall not be compelled to amend this prioritised order for the purpose of treating patients of one party first. Nor shall they be compelled to take actions inconsistent with their humanitarian assignment or their medical ethics.

## **Reporting of possible war crimes**

- 5.57 Medical personnel who, in the course of their service, become aware of circumstances indicating that war crimes may have been committed shall report this to their immediate superior and/or the military police. The duty of confidentiality under the Health Personnel Act shall not prevent them from passing on such information when required by the interests of the public society.<sup>39</sup> The consideration of preventing and countering war crimes must always be regarded as required by the interests of the public society. Examples of matters to be reported include injuries to personnel indicating that unlawful weapons have been used, such as chemical weapons or dum-dum bullets, or of unlawful methods of warfare, such as torture and sexual assault. The matters referred to above shall be reported irrespective of the identity of the suspected perpetrators, i.e. regardless of whether these are a party's own forces or those of the enemy.

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<sup>38</sup> *Geneva Convention I, Article 28; Geneva Convention II, Article 37; Geneva Convention III, Article 33.*

<sup>39</sup> *Act relating to health personnel, etc. of 2 July 1999 No. 64, section 23(4).*

## Wounded, sick, shipwrecked and dead persons

### *General comments on the treatment of wounded, sick and shipwrecked persons*

- 5.58 Wounded, sick and shipwrecked persons, regardless of which party they belong to, shall be respected and protected. In all circumstances, they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition. There shall be no distinction among them based on anything other than medical grounds.<sup>40</sup> Accordingly, treatment priorities shall only be set following a medical assessment. Medical personnel shall not be compelled to amend this order of priority so as to treat patients of one party first. Nor shall they be pressured to take actions inconsistent with their humanitarian assignment or their medical ethics.
- 5.59 The duty to treat wounded enemy personnel must also be evaluated in relation to the risk to medical personnel. Medical personnel are not required to take unreasonable risks to have enemy personnel evacuated, and then to treat them.
- 5.60 As stated in section 5.5 above, medical personnel who fall into enemy hands shall not be detained as prisoners of war, but may nevertheless be detained for as long as necessary to meet the treatment needs of prisoners.
- 5.61 Sick and injured persons shall not be subjected to violence, torture or biological experiments. Moreover, they shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created.<sup>41</sup>
- 5.62 There is a prohibition against subjecting sick and injured persons who are interned, under arrest or otherwise deprived of their liberty to any medical procedure which is not indicated by the health of the person concerned and is not consistent with generally accepted medical standards. Even if consent is obtained, it is prohibited to carry out:

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<sup>40</sup> *Additional Protocol I, Article 10.*

<sup>41</sup> *Geneva Convention I, Article 12.*



- physical mutilations
- medical or scientific experiments, or
- removal of tissue or organs for transplantation, except when these acts are justified by the health of the person concerned<sup>42</sup>

Exceptions may only be made in cases where consent is given to donate blood for transfusion, or skin for grafting, provided that the consent is given voluntarily and without any coercion or inducement. In other words, no other organs may be transplanted, even with the consent of the donor, due to the risk of misuse.

- 5.63 Persons in the power of the enemy or who are interned, under arrest or otherwise deprived of their liberty have the right to refuse any surgical operation. Where treatment is refused, the relevant medical personnel shall seek to obtain a written declaration in this regard, signed or acknowledged by the patient.<sup>43</sup> The right to refuse treatment presupposes that the person has the capacity, in terms of age and mental ability, to safeguard his personal interests. On the other hand, there is no requirement for positive consent to surgical operations, provided that they are necessary on medical grounds. Unconscious patients or patients in a coma may therefore undergo operation unless they have made it clear in advance that they do not wish to have the procedure in question.

### *Searches for missing, injured, sick and dead persons*

- 5.64 After a military encounter, as soon as circumstances permit and no later than the cessation of active hostilities, each of the parties to an armed conflict shall search for and recover wounded and sick persons. The wounded and sick shall be cared for and identified, and steps shall be taken to protect them against looting.<sup>44</sup> They shall be protected against ill-treatment and provided with the care they need, insofar as possible. Searches shall also be made for the dead, and steps shall be taken to prevent their being despoiled.<sup>45</sup>
- 5.65 To ease such searches, the parties shall provide all relevant information directly to the enemy, via a protecting power or to the national information bureau run by the national Red Cross association. The relevant body will forward the information to the ICRC's central tracing unit, which then sends it to the enemy.

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<sup>42</sup> *Additional Protocol I, Article 11.*

<sup>43</sup> *Additional Protocol I, Article 11.*

<sup>44</sup> *Geneva Convention I, Articles 15 and 16; Geneva Convention II, Articles 18 and 19; Geneva Convention IV, Article 16; Additional Protocol I, Article 33; Additional Protocol II, Article 8.*

<sup>45</sup> *Geneva Convention I, Article 15.*

### *Information about the enemy's injured, sick and dead*

- 5.66 The parties shall also register all information in their possession that may help to identify the enemy's injured, sick and dead as soon as possible. To the extent it is practical to do so, the dead shall be identified and examined medically before being buried or cremated, if that is necessary or consistent with their customs.
- 5.67 The information to be provided shall include the following, wherever possible:
- nationality
  - unit or military number
  - surname
  - all first names
  - date of birth
  - any other information on the identity card or identity tag
  - date and place of capture or death
  - information on injuries, illness or cause of death

This information shall be sent to the information bureau established for the purposes of the conflict as quickly as possible; see section 4.75 onwards.

### *Treatment of the dead*<sup>46</sup>

- 5.68 The dead shall be treated in a respectful manner, and their graves shall be respected and maintained.<sup>47</sup> Parties to a conflict shall ensure that burial or cremation of the dead is preceded by a careful examination of the bodies, if possible by a doctor, with a view to confirming death, establishing identity and enabling a report containing this information to be made. Burial or cremation shall be carried out individually when circumstances permit. One half of the double identity disc, or the whole disc if it is a single disc, shall remain on the body.
- 5.69 Bodies shall not be cremated unless imperative hygienic or practical reasons require it, or unless done to respect the customs or religion of the deceased.
- 5.70 Parties to a conflict shall ensure that the dead are buried in a dignified manner, if possible following the ritual of the religion to which they adhered. Further, the parties shall ensure that graves are respected, grouped according to the nationality of the dead, adequately maintained and marked so that they can always be found again.

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<sup>46</sup> Geneva Convention I, Article 17.

<sup>47</sup> FR 13-1 *Kriegsgravtjenesten i Forsvaret* [Norwegian Armed Forces War Graves Service].

## 6

# Prisoners of war and interned persons

## Introduction

- 6.1 During armed conflict, it may be necessary to deprive persons of their liberty for various reasons. The purpose of taking prisoners of war in an armed conflict is to prevent further participation in military operations by the enemy combatants, so the enemy can be weakened. In other words, they are deprived of their liberty on security grounds, not because they are criminals. In armed conflict, it may also be necessary to deprive civilians of their liberty if they participate directly in hostilities or otherwise pose a serious security threat. They may then be interned if absolutely necessary on security grounds. In some cases, persons may also be deprived of their liberty if they are suspected of having committed criminal offences, even if their actions are not directly linked to the armed conflict.
- 6.2 International rules, including the law of armed conflict, contain requirements relating to the treatment of persons deprived of their liberty. It is vital that military personnel are given sufficient training and practice in applying these rules, so that no one is subjected to treatment that violates these requirements.
- 6.3 Ill-treatment of prisoners of war and internees is unacceptable in all circumstances, and will result in disciplinary or criminal prosecution of the individual soldiers and officers responsible.
- 6.4 This chapter describes the status of different categories of persons deprived of their liberty, the conditions for such deprivation of liberty, and the ways in which they are to be treated.
- 6.5 Depending on the nature of the conflict and the basis for the deprivation of liberty, the persons in question can generally be classified as follows:
- prisoners of war in international armed conflicts<sup>1</sup> (see section 6.6 onwards)
  - civilian internees in international<sup>2</sup> and non-international armed conflicts,<sup>3</sup> including members of armed groups not belonging to a state (see section 6.86 onwards)
  - persons suspected of criminal offences (see section 6.126 onwards)

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<sup>1</sup> *Geneva Convention III and Additional Protocol I.*

<sup>2</sup> *Geneva Convention IV, Additional Protocol I.*

<sup>3</sup> *Geneva Conventions Common Article 3; Additional Protocol II, Article 5.*

## I: Prisoners of war

### In general

- 6.6 Persons who participate in an armed conflict on behalf of one state against another, act on behalf of their own state. Lawful acts of war undertaken throughout conduct of hostilities are therefore not subject to criminal law in the same way that similar actions would be if carried out for personal reasons.
- 6.7 Prisoners of war shall be treated humanely and with respect throughout their imprisonment. As soon as persons entitled to prisoner-of-war status are captured, they shall no longer be attacked, but shall be evacuated and delivered to the closest prisoner-of-war facility or unit dealing with prisoners of war. Entitlement to prisoner-of-war status only applies in international armed conflicts. Those entitled to prisoner-of-war status are discussed below, in section 6.11 onwards. The largest category of persons entitled to prisoner-of-war status is soldiers. For them, prisoner-of-war status entails, among other things, immunity against prosecution for acts of war committed in accordance with the law of armed conflict.

### Actions the belligerent states must take at the outbreak of hostilities

- 6.8 All parties involved in an international armed conflict shall, no later than at the outbreak of the armed conflict, take all necessary steps to ensure that prisoners of war and their relatives receive the best possible treatment. Among other things, they shall:
- Appoint a protecting power – either the ICRC or a neutral state tasked with protecting the interests of a party with respect to the enemy.<sup>4</sup> See section 14.76 onwards regarding protecting powers.
  - Establish a national information bureau to receive and forward information about prisoners of war in the power of a party (see section 4.75 onwards).<sup>5</sup>

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<sup>4</sup> *Additional Protocol I, Article 5.*

<sup>5</sup> *Geneva Convention III, Article 122.*

- Issue identity cards to all personnel entitled to prisoner-of-war status upon capture.<sup>6</sup> In the case of Norwegian forces, this will be the standard Norwegian Armed Forces identity card. Special cards shall be issued to civilians who accompany the armed forces, journalists, medical personnel, religious personnel (army chaplains), and civilian civil defence personnel.

6.9 Wherever practicable and appropriate, the following shall also be done:

- Provide the enemy with information about the location and marking of prisoner-of-war installations and transportation.<sup>7</sup>
- Provide the enemy with information about procedures designed to safeguard the right of prisoners of war to receive correspondence, about opportunities to receive relief consignments, and any changes to these procedures.<sup>8</sup>

## Persons belonging to a state party in a conflict

6.10 Since the system of granting prisoner-of-war status is based on the principle that the state is responsible for the treatment of soldiers, the forces must belong to a state party in order for their actions to be considered acts of that state. In practice, this requirement will be met if the forces are subject to the command and control of a military commanding officer acting on behalf of the state.

## Who is entitled to prisoner-of-war status?

6.11 Not all persons who fall into the enemy's hands become prisoners of war or are entitled to prisoner-of-war status. For example, civilians who are not accompanying the armed forces do not fall into this category, and will be entitled to treatment as internees if deprived of their liberty. See section 6.86 onwards on security internment of civilians. Persons entitled to prisoner-of-war status shall be treated as prisoners of war from the moment they clearly communicate an intent to surrender or are otherwise captured. As regards capture specifically, see further discussion in section 6.31 onwards.

6.12 In international armed conflicts, most combatants will be entitled to prisoner-of-war status when deprived of their liberty. If there is doubt as to whether persons are entitled to prisoner-of-war status, they shall be treated as prisoners

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<sup>6</sup> *Geneva Convention III, Article 17.*

<sup>7</sup> *Geneva Convention III, Article 23.*

<sup>8</sup> *Geneva Convention III, section V.*

of war until their status has been considered by a specially appointed tribunal. For further details of this tribunal, see section 6.28.

6.13 The following categories of personnel are entitled to prisoner-of-war status:<sup>9</sup>

- Military and civilian members of the armed forces of a party to a conflict, and members of militias and other volunteer corps forming part of such armed forces. See section 6.18 on the special rules applicable to medical personnel and religious personnel.
- Members of other militias, volunteer corps and organised resistance movements belonging to a party to a conflict and operating in or outside of their own territory, even if this territory is occupied, provided that they satisfy the following conditions:
  - that they are commanded by a person responsible for his subordinates
  - that they have a fixed distinctive sign recognisable at a distance,
  - that they carry arms openly, and
  - that they conduct their operations in accordance with the laws and customs of war
- Members of regular armed forces who profess allegiance to a government or an authority not recognised by the party which has them in its custody.
- Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors and welfare personnel, provided that the armed forces which they accompany have granted them authorisation and provided them with an official identity card.
- Members of crews of the merchant marine and the crews of civilian aircraft belonging to the parties to the conflict.
- Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war. Such personnel are lawful combatants, and are known by the term *levée en masse* (see section 3.20).

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<sup>9</sup> *Geneva Convention III, Article 4.*

### *Special comments on members of the armed forces*

- 6.14 Members of the armed forces have special status under the law of armed conflict, precisely because they act on behalf of the state. This is the reason for the requirement that they must be subject to a system of command and a disciplinary system capable of ensuring compliance with the state's international law obligations. Just as members of the armed forces may lawfully attack members of the enemy's armed forces, they are themselves lawful targets whom the enemy may attack. Accordingly, there is a requirement that they must respect the principle of distinction by distinguishing themselves from civilians, normally by wearing a uniform. There is no requirement for members of the armed forces to carry arms openly, although a military commanding officer may order this to be done (see section 3.12). Lawful combatants who do not wear a uniform or otherwise distinguish themselves from the civilian population when participating in an attack or a military operation in preparation for an attack will generally lose their lawful combatant status and their entitlement to prisoner-of-war status.



*Examples of distinction: a soldier from the Telemark Battalion correctly dressed in Norwegian uniform and a Norwegian patrol in approved winter camouflage. Photo 1: Torgeir Haugaard/Norwegian Armed Forces Media Centre. Photo 2: Norwegian Armed Forces.*

They may also be criminally responsible for actions that would otherwise be lawful acts of war.<sup>10</sup> Preparations for combat activity must be interpreted broadly so as to include things such as troop movements prior to an attack.

### Exceptions from the requirement to wear a uniform

- 6.15 In some conflicts, the nature of the hostilities will render the wearing of uniforms or other visible distinctive signs impracticable. This may, for example, be the case when lawful combatants fight against a stronger occupying power. In such cases, lawful combatants will not violate the law of armed conflict if they do not wear a uniform or visible distinctive sign when participating in an attack or military operation in preparation for an attack. However, in these circumstances the lawful combatants will be required to carry arms openly in the following situations:
- during each military engagement, and
  - during such time as he or she is visible to the adversary while he or she is engaged in a military deployment preceding the launching of an attack in which he or she is to participate
- 6.16 The requirement to carry arms openly is designed to reduce the risk of the adversary considering all civilians potential attackers. “When visible” includes, as an example, the period when combatants are visible through binoculars, night-vision goggles or similar equipment. In this context, “deployment” means any movement towards the place from which an attack is to be launched. Movement from the place where a group gathers to collect equipment and orders before heading towards the target will typically be included in the period of time during which lawful combatants are obliged to carry arms openly. If combatants operating without uniforms do not carry arms openly in such cases, they will violate the principle of distinction and lose their status as lawful combatants and prisoners of war.<sup>11</sup>
- 6.17 The rule establishing an exception to the requirement to wear a uniform had not been introduced at the time of World War II. If it had been, Milorg, a resistance group that operated in occupied Norway, would have been a typical example of personnel entitled to rely on this exception. A liberal application of the exception may challenge the principle of distinction and put the civilian population at large at serious risk of being treated as assumed lawful combatants.

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<sup>10</sup> *Additional Protocol I, Articles 44(3) and (4).*

<sup>11</sup> *Additional Protocol I, Articles 44(3) and (4).*



### *Status of captured medical personnel and religious personnel*

- 6.18 Medical personnel and religious personnel, i.e. chaplains and similar persons, from enemy units may be retained to assist prisoners of war.<sup>12</sup> They are not regarded as prisoners of war, and shall be given the status of retained personnel. They are entitled to all the benefits and protections associated with prisoner-of-war status, and shall be granted such facilitation as they require to allow them to provide prisoners of war with medical care and religious support.

### *Sick and wounded prisoners of war*

- 6.19 Sick and wounded combatants who are captured have prisoner-of-war status, but shall if required be evacuated via the medical chain of evacuation. Until fully recovered they shall receive, in addition to the protection granted to prisoners of war, such protection and treatment as is required by their medical condition. The same applies to prisoners of war who become wounded or sick during their imprisonment. Wounded and sick persons are discussed in detail in chapter 5, on medical services.

### *Mercenaries*

- 6.20 Mercenaries are not entitled to prisoner-of-war status upon capture.<sup>13</sup> Although they are not entitled to treatment as prisoners of war, they are entitled to be treated in accordance with the minimum guarantees set out in sections 4.23–37. In some cases, it may be difficult to distinguish between mercenaries and private contractors. This issue is discussed in sections 3.47–3.52. As stated in section 3.48, there is no international consensus on the definition of a mercenary. If it is unclear whether a person satisfies the required conditions or is entitled to prisoner-of-war status, it shall be assumed that the person is entitled to prisoner-of-war status until established otherwise (see section 6.7 onwards).
- 6.21 A mercenary is any person who meets the following conditions:
- has been recruited locally or abroad to fight in an armed conflict
  - does, in fact, take a direct part in the hostilities
  - is motivated to participate in the hostilities essentially for private gain, and has, in fact, been promised by a party to the conflict, or on its behalf, material compensation substantially exceeding that promised or paid to combatants of similar ranks and functions in the armed forces of that party

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<sup>12</sup> *Geneva Convention III, Article 33.*

<sup>13</sup> *Additional Protocol I, Article 47.*

- is not a national of a party to the conflict and is not resident in territory controlled by a party to the conflict
- is not a member of the armed forces of a party to a conflict, and
- has not been sent by a state which is not a party to the conflict on an official duty as a member of that state's armed forces

### *Deserters and defectors*

- 6.22 Military deserters shall have prisoner-of-war status if captured. Prisoners of war who “defect” during their detention shall continue to have prisoner-of-war status and cannot renounce such status.<sup>14</sup>

### *Spies*

- 6.23 A spy is a person who covertly or under false pretences gathers or attempts to gather information while in territory controlled by the enemy, with the aim of passing such information on to the other party. Examples of false pretences include pretending to be a civilian, journalist, relief worker, etc. Such information will normally be received by the spy's own military forces or intelligence service. Consequently, lawful combatants who gather information behind enemy lines cannot be apprehended for espionage provided that they wear the uniform of their own forces. See further discussion of espionage in sections 9.46–49.
- 6.24 Persons who are captured while engaged in espionage are not entitled to prisoner-of-war status, but are entitled to be treated in accordance with the fundamental guarantees set out in sections 4.23–37. However, if lawful combatants who have operated as spies are not captured until after they have returned their own forces, they will be entitled to prisoner-of-war status.<sup>15</sup>

### *Civilians*

- 6.25 Civilians authorised to accompany the armed forces will have prisoner-of-war status if captured.<sup>16</sup> Other civilians, including public officials, not accompanying the armed forces will not become prisoners of war, but must be treated in accordance with the rules protecting civilians presented in chapter 4. Civilians may be interned when absolutely necessary for security reasons. For further discussion of internment of civilians, see section 6.86 onwards.

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<sup>14</sup> *Geneva Convention III, Article 7.*

<sup>15</sup> *Additional Protocol I, Articles 46(3) and (4).*

<sup>16</sup> *Geneva Convention III, Article 4(A)(4).*

## *War correspondents and journalists*

- 6.26 Civilian war correspondents who are accredited to the armed forces shall have prisoner-of-war status upon capture.<sup>17</sup> They must carry approved identity cards. If a correspondent is a member of the armed forces, the general rules presented in section 6.14 onwards will apply. Other journalists working in areas where an armed conflict is occurring are entitled to protection as civilians.<sup>18</sup> They will lose this protection if, and for such time as, they engage in information-gathering or other activities in a way that qualifies as direct participation in hostilities, for example intelligence-gathering. In such cases, they will be lawful targets and may be interned. For detailed description of actions qualifying as direct participation in hostilities, see section 3.21 onwards. ID cards showing that a person is a journalist may be issued by national authorities. Journalists are discussed further in sections 4.60–61.

## **Decision on prisoner-of-war status**

- 6.27 In principle, captured persons shall be given prisoner-of-war status if:
- they claim, or appear to be entitled to, such status, or
  - the enemy claims such status on their behalf by notifying either the detaining power or the protecting power<sup>19</sup>
- 6.28 Since it is often difficult to distinguish lawful combatants from other combatants, it may also be difficult to decide whether a person should be granted prisoner-of-war status if he has participated in hostilities and then been captured. Accordingly, the law of armed conflict provides that where there is doubt, it shall be assumed that captured persons are entitled to prisoner-of-war status.<sup>20</sup> Such persons shall be treated as prisoners of war until their status is determined by a specially appointed tribunal. This tribunal should comprise at least three persons. One of the members should be a lawyer, while the chair should be an officer holding at least the rank of major, or similar. The tribunal shall be independent, and shall base its

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<sup>17</sup> *Geneva Convention III, Article 4(A)(4).*

<sup>18</sup> *Geneva Convention III, Article 79; UN Security Council Resolution 1738 (2006) on the protection of journalists as civilians in armed conflict.*

<sup>19</sup> *Additional Protocol I, Article 45(1).*

<sup>20</sup> *Geneva Convention III, Article 5; Additional Protocol I, Article 45.*

decisions on expert assessments of the facts. The tribunal shall be appointed in accordance with general national guidelines for the specific operation.

- 6.29 The presumption of prisoner-of-war status only applies to persons who are captured in an international armed conflict, since there are no provisions on prisoner-of-war status in non-international armed conflicts.
- 6.30 Persons in the custody of Norwegian forces who are to be criminally prosecuted by the Norwegian state for acts relating to hostilities (usually war crimes), are entitled to assert their right to prisoner-of-war status and entitled to have that question assessed by the Norwegian court that will be hearing the matter. This assessment shall take place before the criminal proceeding is begun.<sup>21</sup>

## Capture

- 6.31 An enemy must meet three conditions in order for another party to be obliged to respect the enemy's wish to surrender:<sup>22</sup>
- the intention to surrender must be clearly expressed to the other party
  - the person wishing to surrender must abstain from further hostile acts, and
  - no attempt must be made to escape
- 6.32 A person who is captured will generally either have surrendered or be unconscious, sick or wounded. From the moment a person clearly expresses a wish to surrender, he may not be attacked and must be treated as a prisoner of war. A person may give such an expression by word or action, by laying down his weapons, raising his hands into the air or waving a white flag. A white flag actually signals a desire to negotiate, rather than surrender, but is also often used by persons who wish to surrender. It is never permissible to attack a person approaching under a white flag to negotiate. At sea, the traditional sign of surrender has been to lower the vessel's flag, i.e. its naval ensign. Today, however, the most practical method would be to give notice of surrender by radio as well.
- 6.33 Persons who are unconscious or otherwise *hors de combat* due to wounds or sickness and who are therefore unable to defend themselves shall not be attacked, but rather be taken as prisoners of war provided that they refrain from all hostile acts and do not attempt to escape.

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<sup>21</sup> Additional Protocol I, Article 45(2).

<sup>22</sup> Additional Protocol I, Article 41.



*German soldiers surrendering to Norwegian commandos participating in the Allied capture of Walcheren in the Netherlands in November 1944. There are no formal requirements as to how combatants should surrender, but it is normal to express the desire to surrender by raising one's hands over one's head. Photo: Norwegian War Archives/NTB Scanpix.*

- 6.34 Prisoners of war shall be disarmed and searched as soon as possible. Initially, the most important thing is to gain control of objects a prisoner of war could use to injure himself or others. More thorough searches can be conducted at a later time.
- 6.35 Prisoners are entitled to keep the property listed below when they are searched:<sup>23</sup>
- clothing, military and civilian clothing including any protective suit or similar protective equipment
  - military protective equipment, such as a helmet, protective vest and protective mask
  - food, water bottle and similar items
  - distinctions, unit markings, markings of nationality, decorations, medals and similar items

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<sup>23</sup> Geneva Convention III, Article 18.

- ID card and dog tags
  - personal property which a prisoner may be carrying, such as glasses and articles of significant personal or sentimental value, such as pictures, letters and similar items, except for items which may have intelligence value
- 6.36 All other military equipment may be seized. This includes weapons and ammunition, military equipment which is not protective equipment, military documents such as orders, maps, telephone/communications equipment, computers, memory sticks and notebooks which may contain military information. The seized objects become the property of the detaining power, and shall not pass into private ownership. Relevant objects, such as weapons, ammunition and communications equipment, may however be put to use by Norwegian forces. All seized property shall be marked and registered.
- 6.37 Personal property shall only be seized on security grounds. This includes items which may be used as weapons, such as razor blades and knives, as well as objects which may affect security, such as cameras and mobile phones.
- 6.38 Money, bank cards and similar objects shall only be taken from prisoners on orders by an officer. The amount seized shall be recorded in a special register as soon as possible, and the prisoner shall be issued with an invoice. The invoice shall specify the name, rank and unit of the person issuing it. Money which is taken from prisoners upon capture shall either be transferred to the prisoner's account or be stored and returned when the prisoner is released.
- 6.39 Valuables may be confiscated to ensure safekeeping during imprisonment. Such confiscations shall be registered, and the prisoner shall be issued with an invoice.
- 6.40 Upon capture, wounded and sick prisoners shall be given necessary medical care as soon as possible. If the medical service has capacity problems, the order of priority shall be set in accordance with strict medical criteria. The prisoners with the most serious wounds or sicknesses shall have first priority, irrespective of whether they are prisoners of war or members of the detaining power's own forces.

- 6.41 Prisoners shall be treated humanely and with respect. However, this does prohibit the use of such force as is necessary to establish control over prisoners of war and to prevent them from presenting a threat to one's own forces.
- 6.42 Prisoners of war must be identified and registered as soon as possible.<sup>24</sup> In order to determine the identity of prisoners, biometric data may be collected, including fingerprints, DNA, voice samples, iris scans, etc. Such data shall be collected, stored and in relevant cases handed over or destroyed in accordance with the guidelines applicable at any given time.<sup>25</sup>
- 6.43 As soon as circumstances permit, prisoners of war shall be informed of their right to send and receive correspondence.
- 6.44 Units in charge of imprisonment must evaluate whether prisoners should be separated from one another. Such separation may be appropriate in view of potential future intelligence interrogations. A likely course in such a context would be to separate officers from rank-and-file soldiers and perhaps to separate the commanders of a captured unit from the rest of the prisoners of war. Women and children shall be separated from male prisoners; see section 6.65.

## Transport and evacuation<sup>26</sup>

- 6.45 As soon as possible, prisoners of war shall be evacuated to an area located sufficiently far from the battlefield that they are not at risk. Normally, prisoners of war are evacuated to special prison camps. The only exception to this rule is when moving prisoners would present a greater risk, due to wounds or sickness, than holding them on site.
- 6.46 Prisoners of war shall not be exposed to unnecessary danger pending, or during, evacuation. The unit in charge of the evacuation shall take all necessary precautions to ensure prisoner safety during evacuation and transportation. This will include protecting prisoners against attacks and reprisals from the civilian population or other military forces. The evacuation of prisoners of war shall occur in a manner that is humane and similar to the manner in which one's own forces are transported.

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<sup>24</sup> *Geneva Convention III, Article 17.*

<sup>25</sup> *STANAG 2195 (edition 2) – Captured Persons, Material and Documents – AJP-2-5(A), Annex K.*

<sup>26</sup> *Geneva Convention III, Articles 19 and 20.*

## Treatment of prisoners of war

- 6.47 Formally, prisoners of war are considered to be in the power of the enemy (state) and thus that state's responsibility, not the responsibility of the individual persons or units that have captured them. A state which has prisoners of war in its custody therefore also has overall responsibility for their treatment, even though individual responsibility may arise on the part of individual soldiers and officers involved in the treatment of prisoners of war.
- 6.48 The following fundamental, absolute rules govern the treatment of prisoners of war:<sup>27</sup>
- Prisoners of war shall be treated humanely and with respect.<sup>28</sup>
  - Any adverse distinction based on race, colour, national or social origin, wealth, birth or other status, sex, language, religion or belief, political or other opinion or on any other similar criteria is prohibited.<sup>29</sup>
  - Reprisals against prisoners of war are prohibited.



*An Iraqi soldier who has surrendered to US forces following the invasion of Iraq in 2003 is helped to drink water. Prisoners of war shall be treated humanely and shall, among other things, be given access to necessary food and drink. Photo: Itsuo Inouye/AP/NTB Scampix.*

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<sup>27</sup> In addition to the provisions of Geneva Convention III, see Additional Protocol I, Article 75.

<sup>28</sup> Geneva Convention III, Articles 13 and 14.

<sup>29</sup> Geneva Convention III, Article 16.



- 6.49 Female soldiers shall always be treated with respect for their gender and particular needs. They shall never be treated less favourably than male prisoners of war.<sup>30</sup> Their gender shall also be taken into account when assigning work and allocating sleep and sanitation facilities.<sup>31</sup> They shall also be protected specifically against rape or other forms of sexual assault.<sup>32</sup> For further discussion of women and children's special rights, see sections 4.48–53.
- 6.50 Prisoners of war shall never be subjected to physical ill-treatment or medical or scientific experiments of any kind. They shall always be protected, particularly against acts of violence or intimidation, insults and public curiosity.<sup>33</sup>

### *Use of force against prisoners of war*

- 6.51 There will be a need to ensure that prisoners of war do not escape, attack personnel or gather military information. Generally, there will be a particular need to secure prisoners during the initial phase of detention and in connection with the evacuation and transportation of prisoners.
- 6.52 Necessary force may be used to prevent prisoners of war from escaping. Deadly force may only be used if less severe use of force is insufficient. If possible, a warning shall be given that deadly force will be used.<sup>34</sup>
- 6.53 The following methods and force is permitted to use to protect oneself and others, when undertaking searches, and to prevent escape or maintain operational security:

#### *a. Search positions*

There will always be grounds for searching a captured person. For this purpose, it is permitted to require the person to stand up, for example against a wall, with legs spread, but only for the purposes of performing a search and only for as long as necessary to conduct the search.

#### *b. Handcuffs and similar devices*

Handcuffs, plastic handcuffs or similar equipment may be used to restrict the free movement of a captured person, but no methods shall be used that are assumed to cause unnecessary pain or physical injury. Handcuffs, plastic handcuffs and similar equipment may be necessary to prevent escape, violence, etc., but shall only be used to the extent deemed necessary based on such considerations.

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<sup>30</sup> Geneva Convention III, Article 14.

<sup>31</sup> Geneva Convention III, Article 25.

<sup>32</sup> Additional Protocol I, Article 76.

<sup>33</sup> Geneva Convention III, Article 13.

<sup>34</sup> Geneva Convention III, Article 42; General Civil Penal Code (1902), section 48, third paragraph.

c. *Restriction of sight*

To maintain operational security, it may be necessary to restrict the opportunity of prisoners to survey their surroundings. For this purpose, opaque goggles or similar devices may be used, but only for the length of time and to the extent necessary to maintain operational security. It is impermissible to pull a hat, bag or similar object down over the prisoner's head to achieve the same effect, since this may cause breathing problems. An alternative could be to cut up a piece of cloth (such as a hat, bag or similar object), for use as a blindfold.

d. *Restriction of hearing*

To maintain operational security, it may be necessary to restrict the opportunity of prisoners to hear what is being said or done in their vicinity. This may be done to prevent prisoners of war from hearing what is said by capturing personnel or from communicating with each other during the initial phase of detention. Although hearing protection may be used for this purpose, this may only be done for the length of time and to the extent necessary to maintain operational security.

6.54 The following methods and force are prohibited to use, whether used in connection with capture, consultation, interrogation, or otherwise. Since the list is not exhaustive, it should not be concluded that measures not included on the list are lawful:

- *Stress positions*: forcing a prisoner of war to assume positions intended to cause the prisoner physical pain
- *Hooding*: drawing a hat, bag, etc. down over the prisoner's head
- *Exposure to noise*: deliberately keeping a prisoner of war in surroundings where there are bothersome noises, with the aim of tormenting the prisoner
- *Sleep deprivation*: deliberately depriving a prisoner of war of sleep with the aim of tiring him out
- *Restriction of food and drink*: deliberately restricting a captured person's access to food and drink, unless due to a lack of supplies and one's own forces must accept similar rationing
- *Degrading treatment*: exposing a prisoner of war to sexual or religious harassment, ridicule or insults

## *Interrogation of prisoners of war*

- 6.55 When interrogated, prisoners of war are only obliged to state the following:<sup>35</sup>
- surname and first names
  - rank
  - date of birth and service number (for Norwegian personnel this means their national identity number)
- 6.56 Additional questioning to gather information is permitted, but such information must be provided voluntarily. Any interrogation shall take place in a language understood by the prisoner of war, using an interpreter if necessary. No physical or mental torture or force may be used against prisoners of war to secure information of any kind from them. Prisoners who refuse to answer shall not be threatened, insulted or subjected to unpleasanties or the loss of any privileges. Prohibited methods include interrogation techniques incorporating the following:
- threats of violence against the prisoner of war or others
  - forced nudity or other degrading treatment
  - deprivation of sensory inputs
  - starvation
- 6.57 Prisoners of war who due to the state of their physical or mental health are unable to provide information on their identity shall be transferred to the medical service. Other methods shall be used to establish the identity of such prisoners, such as biomedical data or the collection of information from other prisoners.<sup>36</sup>
- 6.58 Prisoners of war shall primarily be interrogated by military police or intelligence/security personnel with special training. Detailed rules on the conduct of interrogations can be found in national regulations. Reports must be written on all interrogations.

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<sup>35</sup> *Geneva Convention III, Article 17.*

<sup>36</sup> *Geneva Convention III, Article 17.*

## Crimes against prisoners of war

- 6.59 The killing of prisoners of war is prohibited. Prisoners of war shall not be killed even if this prohibition causes the capturing unit substantial problems. Examples of such problems may include:
- that the capturing force lacks the necessary facilities, equipment and personnel to control the prisoners of war and their movements
  - that the capturing force has to care for the prisoners of war, resulting in too little food for its own forces
  - that the capturing force, such as a patrol operating behind enemy lines, risks discovery unless it kills one or several captured persons, or
  - that it is unfeasible to take prisoners of war along
- 6.60 If these kinds of problems arise, the prisoners of war must be released. The capturing unit will then be obliged to take all feasible precautions to ensure their safety.<sup>37</sup> What is considered feasible in such instances will depend on a specific assessment of the situation on the ground, taking into account both humanitarian and military factors.
- 6.61 All unlawful acts or omissions by a capturing unit that cause the death of or serious injury to prisoners are prohibited.

## Rules during imprisonment in prisoner-of-war camps

### *Placement of prisoner-of-war camps*<sup>38</sup>

- 6.62 Prisoner-of-war camps shall not be placed close to military objectives with the purpose of shielding those objectives against attack. The placement of prisoner-of-war camps shall be communicated to the enemy either directly or via the protecting power, and when possible prisoner-of-war camps shall be marked with the letters “PW” or “PG” in a manner that ensures that the markings are also visible from the air. These types of markings enjoy special protection, and must not be used for purposes other than marking prisoner-of-war camps.
- 6.63 Prisoners of war may be interned only in premises on land, and prisoner-of-war camps must be located in areas which are not hazardous to health.<sup>39</sup>

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<sup>37</sup> *Additional Protocol I, Article 41(3).*

<sup>38</sup> *Geneva Convention III, Article 23.*

<sup>39</sup> *Geneva Convention III, Article 22.*

### *Classification of prisoners of war*

- 6.64 Separate areas shall be established for officers.<sup>40</sup> Prisoners of war with the same nationality, language and customs shall be kept together. The same applies to prisoners who were serving in the same unit or force at the time of capture, unless they consent to being separated.
- 6.65 Women and children under the age of 18 should be kept separate from male prisoners unless they are related. Women shall be under the direct supervision of female guards.

### *ID cards<sup>41</sup>*

- 6.66 If a prisoner of war lacks an adequate ID card, he shall be issued with an ID card displaying his surname, first names, rank, service, military number or national identity number, as well as date of birth. The ID card shall be presented by the prisoner of war upon request, and shall never be taken from the prisoner of war.

### *Quarters<sup>42</sup>*

- 6.67 Prisoners of war shall be quartered under conditions as favourable as those enjoyed by the detaining power in the same area. Prisoners of war shall have the opportunity to seek cover from attack.

### *Food<sup>43</sup>*

- 6.68 Prisoners of war shall be provided with sufficient food to avoid weight loss, nutritional deficiencies, etc. Wherever feasible, account shall be taken of the habitual diet of the prisoners of war.

### *Clothing<sup>44</sup>*

- 6.69 Prisoners of war must be provided with adequate clothing, taking into account the local climate.

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<sup>40</sup> Geneva Convention III, Article 16 and Article 22, third paragraph.

<sup>41</sup> Geneva Convention III, Article 17.

<sup>42</sup> Geneva Convention III, Article 25.

<sup>43</sup> Geneva Convention III, Article 26.

<sup>44</sup> Geneva Convention III, Article 27.

### *Health and hygiene*<sup>45</sup>

- 6.70 The detaining power is obliged to implement all necessary sanitation measures to maintain cleanliness and health in camps and prevent epidemics. All prisoner-of-war camps shall have a medical ward. Prisoners of war shall have access to the medical personnel of the capturing party. Special facilities shall be made available to care for disabled persons and undertake their rehabilitation until their imprisonment ends. Prisoners of war who have injuries or conditions that require special treatment shall be given such treatment at a military or civilian hospital or similar institution where such treatment can be provided. Prisoners of war shall not be prevented from seeking medical advice or being examined.

### *Religious, intellectual and physical activities*<sup>46</sup>

- 6.71 Prisoners of war have full freedom to pursue their religious obligations, and shall wherever possible be provided with adequate facilities to allow them to practice their religion in a satisfactory manner. Chaplains and comparable persons detained by the enemy are not prisoners of war and shall be granted the opportunity to perform their functions for prisoners of war. The detaining power shall encourage intellectual development and recreation, sports and games, and shall seek to maintain facilities and equipment for these purposes.

### *Visits and correspondence*<sup>47</sup>

- 6.72 Representatives of any protecting power (see section 6.8) and delegates from the ICRC shall be granted opportunity to visit prisoners of war and talk to them privately. If security considerations permit, other organisations providing assistance to prisoners of war shall also be granted access to the prisoners of war.
- 6.73 No later than one week after arriving at a prisoner-of-war camp, prisoners of war shall be assisted in sending a notification of capture specifying their address and state of health to the national information bureau for prisoners of war as well as to their family.<sup>48</sup> The role of national information bureaus is discussed further in sections 4.75–79. Moreover, prisoners of war shall be permitted to correspond with the outside world during their imprisonment. Such correspondence may be censored on security grounds.<sup>49</sup>

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<sup>45</sup> Geneva Convention III, part III, section II, chapter III.

<sup>46</sup> Geneva Convention III, Articles 34–38.

<sup>47</sup> Geneva Convention III, Article 125.

<sup>48</sup> Geneva Convention III, Article 70.

<sup>49</sup> Geneva Convention III, Article 76.

## **Work**

- 6.74 Although officers may not be compelled to work, all practical steps shall be taken to provide them with work if they so wish. Non-commissioned officers may only be forced to work as instructors or leaders, but whenever possible they, like officers, shall be given suitable work if they so wish. Examples of the types of work which prisoners of war may be ordered to do include administrative tasks; construction or maintenance of the prisoner-of-war camp; agriculture; construction or public service work that has no military character or purpose; and commercial trade or arts and crafts. Prisoners of war shall not be forced to perform work which may be hazardous to their health or otherwise dangerous, such as mine clearance or work connected to the metallurgical, machinery and chemical industries, unless this is done voluntarily. Such voluntary work should only take place after representatives from the ICRC or protecting power have had an opportunity to verify that the work is in fact being carried out voluntarily. Prisoners of war shall not be forced to do work that contributes to warfare, or work that would be considered humiliating or degrading if performed by the detaining power's own forces.<sup>50</sup>

## **Prisoner representatives**

- 6.75 As a rule, there should be a prisoner representative where prisoners of war are held. Prisoner representatives are mandated to represent the prisoners of war in dealings with the military authorities, protecting power, ICRC and any other organisation providing support to them. In the officers' camp, the highest-ranking officer shall be assumed to represent the prisoners of war. In all other camps, a representative shall be elected every six months.<sup>51</sup>

## **Disciplinary and legal sanctions**

- 6.76 Prisoners of war are subject to the same laws, regulations and orders as the detaining power's armed forces for the duration of their imprisonment. They must therefore be informed of the relevant rules. Legal or disciplinary measures may be taken against them for any violation of such provisions. Minor breaches will result in disciplinary steps. More serious violations may result in criminal law sanctions. Wherever possible, disciplinary measures shall be preferred.<sup>52</sup> In the event of any disciplinary or criminal law prosecution of prisoners of war, advice and assistance shall be sought from the judge advocate general/judge advocate and military police.

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<sup>50</sup> Geneva Convention III, Article 49 onwards.

<sup>51</sup> Geneva Convention III, Articles 79–81.

<sup>52</sup> Geneva Convention III, Article 82 onwards; see also the Military Disciplinary Code, section 48, and the Military Disciplinary Regulations, sections 184–187.

- 6.77 Prisoners of war shall not be given a harsher penal sanction for a violation than would have been given to a member of the detaining power's armed forces for a similar violation.
- 6.78 Relevant types of disciplinary punishments include fines, withdrawal of privileges, fatigue duties and arrest.<sup>53</sup> The duration of a disciplinary punishment shall not exceed 30 days. The most typical violation by prisoners of war resulting in a disciplinary penalty is attempted escape.
- 6.79 If prisoners of war are to be criminally prosecuted in Norway, the criminal case shall be heard by the ordinary civilian courts.
- 6.80 A number of procedural rules apply in connection with legal proceedings against prisoners of war:
- Investigation must be conducted as quickly as possible.
  - Prisoners of war may not be kept isolated pending a trial unless the detaining power's armed forces may be kept isolated in similar cases.
  - Notice of criminal prosecution must be given to:
    - the accused, giving details of the charges well in advance of any trial, and
    - the protecting power, where one has been appointed, at least three weeks before the court case.
  - Prisoners of war are entitled to be represented by a qualified lawyer of their choice, and to be assisted by another prisoner of war.

### *Escape and attempted escape*<sup>54</sup>

- 6.81 Prisoners of war who have successfully escaped but are recaptured shall not suffer reprisals due to the escape. A prisoner of war shall be regarded as having successfully escaped when he:
- rejoins his own or allied forces
  - enters neutral territory or otherwise leaves the territory under the control of the capturing party, or
  - boards a ship which is not under the control of the capturing party, even if it is located in the territorial waters of that party

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<sup>53</sup> Geneva Convention III, Article 89 onwards.

<sup>54</sup> Geneva Convention III, Article 91 onwards.



- 6.82 A prisoner who is captured during an attempt to escape may only be subjected to disciplinary penalties for attempted escape and actions taken exclusively to facilitate escape. These may include use of false papers, use of civilian clothing and the theft of objects without the motive of personal gain for use in connection with escape. Unlawful acts, such as murder or violence committed against sentries in connection with escape may be criminally prosecuted.

## Duration of prisoner-of-war status and repatriation/transfer<sup>55</sup>

- 6.83 Prisoners of war are entitled to status and treatment as prisoners of war from the moment of their capture until they are released, repatriated (transferred to their home state), or transferred to another state. They are not able to waive their rights or status as prisoners of war or their right to protection, even of their own free will. Accordingly, the term “prisoner of war” also encompasses deserters and defectors. The reason for this is that prisoners of war, like other victims of armed conflict, are in a highly vulnerable situation as regards negotiations with their captors.
- 6.84 As a rule, prisoners of war shall be repatriated as soon as hostilities cease, although in some cases repatriation shall occur earlier. Seriously injured and sick prisoners of war must be repatriated as soon as they are well enough to be transported, even if the hostilities have not ended. However, prisoners of war cannot be forced to be repatriated if hostilities are ongoing. Prisoners of war who are terminally injured or sick and who will not recover within one year, and persons who are seriously and permanently disabled, shall be repatriated directly to their home country. Further, the parties to a conflict may conclude agreements under which prisoners of war who have been detained for extended periods shall be repatriated via a neutral country. Prisoners of war who are repatriated in this manner, i.e. on medical grounds or due to extended detention, shall not participate in the conflict again. No such restrictions apply to prisoners of war who are repatriated on other grounds.
- 6.85 Prisoners of war who are in the custody of the Norwegian state may be transferred to a state other than the prisoner of war’s home state, but only once it has been verified that the recipient state has both the ability and the willingness to comply with the same obligations as Norway with respect to prisoners of war. Transfer decisions shall be approved by the Ministry of Defence or such person as the ministry authorises to do so.

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<sup>55</sup> Geneva Convention III, Article 109 onwards.

## II: Security internment

### In general

- 6.86 Security internment may be implemented for civilians when absolutely necessary for security reasons.<sup>56</sup> Internment is the most severe control measure that may be implemented with respect to civilians deemed to present a serious security threat to the detaining power. In this context, “civilians” includes both single individuals and persons who are members of armed groups not belonging to a state.
- 6.87 Internment entails the holding of persons, normally under guard. The purpose of internment is not to punish, but rather to remove those participating directly in hostilities or otherwise presenting a serious security threat for as long as they continue to present such a threat. Internment is a preventive measure, i.e. it is used to prevent relevant persons from engaging in hostile or threatening acts. Accordingly, it does not encompass deprivation of liberty in the form of arrest, custody or imprisonment based on suspicions that a criminal offence has been committed.
- 6.88 Internment shall not be a routine measure, and may only be implemented on the basis of an individual assessment of the threat presented by a given individual, without discrimination of any kind.
- 6.89 During an armed conflict, Norwegian forces may intern civilians either in their own territory or in occupied territory if this is absolutely necessary for security reasons. The rules on internment of civilians in international armed conflicts apply *mutatis mutandis* to non-international armed conflicts. The following sections therefore contain a comprehensive presentation of the security internment rules for civilians in both international and non-international armed conflicts.
- 6.90 In international armed conflicts, persons who are not entitled to prisoner-of-war status may be interned if the stipulated conditions are met. In non-international armed conflicts, no persons will have the status of prisoners of war and security internment is therefore the only category of internment applicable to civilians who present a serious threat to security.

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<sup>56</sup> Geneva Convention IV, Articles 42 and 78; Geneva Conventions common Article 3; Additional Protocol II, Article 5.

- 6.91 Specific procedures will usually be established regarding the basis for and practice of internment in a given operation. These may indicate, among other things, which security threats are expected to constitute adequate grounds for security internment.
- 6.92 As an alternative to internment, persons may be placed in assigned residence either in the detaining power's own territory or in occupied territory. Assigned residence involves compelling persons to leave a certain area or compelling them to remain in a certain area, for example a specific part of a city.<sup>57</sup> The conditions under which persons may be placed in assigned residence are the same as those applicable to internment.
- 6.93 Internment is a national responsibility, and Norwegian forces must therefore generally carry it out on their own, from start to finish. In relevant cases, an agreement may be concluded with other states for the implementation of all or parts of the internment. Such agreements are concluded by the Ministry of Defence.
- 6.94 Military commanders who make decisions about internment or assigned residence shall seek the advice from a legal adviser in the Norwegian Armed Forces.

## Conditions for security internment

- 6.95 The condition that must be met in order to intern a civilian is that internment is absolutely necessary on reasons of security because the person constitutes a serious threat to security.<sup>58</sup>
- 6.96 Internment is a serious intervention in personal liberty, and the conditions under which it may be imposed are therefore strict. In order for security internment of a civilian in an armed conflict to be permissible, other options such as deportation, obligatory periodic reporting to the police for registration or similar measures must be deemed insufficient to safeguard security.

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<sup>57</sup> *Geneva Convention IV, Articles 41–43 and 78.*

<sup>58</sup> *Geneva Convention IV, Articles 42 and 78; Geneva Conventions Common Article 3; Additional Protocol II, Article 5.*

- 6.97 The most important category of persons who can be said to present a serious threat to security, and who may therefore be interned, is that of civilians who participate directly in hostilities. This category is discussed further in section 3.21 onwards. However, the category of persons who may present a serious threat to security also includes other persons than those participating directly in hostilities. Examples of these may include persons who finance military operations, persons who recruit personnel for military operations, and persons who have previously participated directly in hostilities and can reasonably be expected to do so again. Internment will therefore be an important alternative in cases where it is unclear whether a person does in fact satisfy the conditions for direct participation in hostilities and it is therefore unclear whether the person is a lawful target.
- 6.98 Other examples of security factors that may serve as grounds for internment include suspicions that persons are involved in activities in support of the enemy, such as training and passing on intelligence information; suspicions regarding planned sabotage; or the provision of other indirect assistance that materially contributes to the enemy's actions.
- 6.99 No specific level of suspicion can be established as a requirement, but there must be reasonable grounds for believing that the person in question represents a serious threat to security and that it is therefore absolutely necessary to intern him or her. The level of suspicion required to place a person in security internment depends on the specific situation. The seriousness of the threat will be among the relevant factors. If the threat is very serious, such as specific information that one or more persons will attack Norwegian forces with lethal means in the near future, a smaller degree of suspicion will be required than if the question is one of interning a person suspected of passing along information that is of military value but does not constitute a specific deadly threat to Norwegian forces.
- 6.100 In addition to the options of forced security internment, any person who so demands is entitled to internment if it is deemed necessary for his or her own security. That may be the case for persons who feel spurned and threatened by the civilian population and therefore seek the protection of the state. It is important that they in fact do so voluntarily, and not under pressure.
- 6.101 In multinational operations, it may be appropriate to cooperate with others with respect to internment facilities. In such cases, it will be particularly important to be aware that not all countries have the same international legal obligations as Norway, and that Norway and other countries interpret international law differently. Norwegian forces must in any case comply with Norwegian rules and regulations.

## Requirements for treatment and facilities

- 6.102 The treatment of internees, whether in an international or non-international armed conflict, is largely equivalent to the treatment to be given to prisoners of war.<sup>59</sup>
- 6.103 Internees shall be informed of the reason for internment as quickly as possible, in a language they understand.
- 6.104 As in the case of prisoner-of-war camps, internment camps shall not be located in areas particularly exposed to the dangers of war, and the camps shall be marked as clearly as possible with the letters “IC” to prevent aerial attacks.<sup>60</sup>
- 6.105 Buildings used for internment must offer adequate heating and satisfactory lighting and sanitation facilities. Places where detainees can practice their religion must be made available. Internees shall have access to emergency shelters in the internment camp.
- 6.106 Internees shall always be treated humanely and shall not be subjected to adverse distinction of any kind based on race, colour, religion or belief, sex, place of birth, wealth or similar factors. Discipline at places of internment shall be consistent with humanitarian principles. Among other things, this implies that internees shall not be ordered to engage in physical exertion dangerous to their health or involving physical or moral hardship. In particular, prolonged standing and roll-calls, punishment drill, military drill and manoeuvres, or the reduction of food rations, are prohibited.<sup>61</sup> Further, internees shall always be separated from other kinds of prisoners, such as prisoners of war in international armed conflicts and persons held for other reasons, particularly prisoners serving a sentence of imprisonment.<sup>62</sup> Interned persons shall not be ordered to perform work, but may be given the opportunity to work if they wish. Such work shall not be related to military operations.

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<sup>59</sup> *Geneva Convention IV, Articles 79–141; Geneva Conventions Common Article 3; Additional Protocol II, Article 5.*

<sup>60</sup> *Geneva Convention IV, Articles 83 and 84; Additional Protocol II, Article 5(2)(c).*

<sup>61</sup> *Geneva Convention IV, Article 100.*

<sup>62</sup> *Geneva Convention IV, Article 84.*

6.107 Internees shall be provided with food sufficient to keep them in a good state of health and prevent the development of nutritional deficiencies, as well as clothing appropriate to the climate.<sup>63</sup> Interned persons shall receive necessary medical help and treatment.<sup>64</sup> A health check shall be undertaken as soon as possible after internment commences, and thereafter as often as indicated by the internee's health. The health of those interned shall also be examined immediately prior to any transfer or release. All health examinations shall be documented both in writing and by means of photographs.

6.108 No physical or moral coercion may be used against internees, particularly for the purpose of obtaining information.<sup>65</sup> Any measure that may cause an internee physical or mental injury is prohibited. This applies, for example, to murder, torture, physical punishment, mutilation and medical treatment not justified by the internee's medical needs,<sup>66</sup> as well as any form of brutality whether performed by military or civilian personnel. The following acts are specifically prohibited:<sup>67</sup>

- rape, sexual enslavement, enforced prostitution, forced pregnancy, forced sterilisation and any other form of sexual violence
- violations of personal dignity, in particular humiliating and degrading treatment
- punishment of an internee for violations he has not committed
- passing of a sentence without prior judgment pronounced by a regularly constituted court
- collective punishments or other measures that threaten or terrorise
- pillage and theft
- reprisals against internees or their property
- hostage-taking

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<sup>61</sup> *Geneva Convention IV, Article 100.*

<sup>62</sup> *Geneva Convention IV, Article 84.*

<sup>63</sup> *Geneva Convention IV, Articles 89 and 90; Additional Protocol II, Article 5(1)(b).*

<sup>64</sup> *Geneva Convention IV, Articles 91 and 92; Additional Protocol II, Articles 5(1)(a) and (2)(d).*

<sup>65</sup> *Geneva Convention IV, Article 31.*

<sup>66</sup> *General Civil Penal Code (2005), section 103.*

<sup>67</sup> *General Civil Penal Code (2005), sections 103–104; Geneva Conventions I–IV, Common Article 3; Additional Protocol I, Article 75.*

- 6.109 The specific guidance relating to internment that is given for a particular operation shall contain details of the information to be registered about internees and their material. The information about each individual internee and any material taken from him or her shall be stored in a proper manner. Internment shall be reported up the chain of command as quickly as possible.
- 6.110 In international armed conflicts, the protecting power, if one has been appointed (see section 6.8), and the ICRC shall be informed that persons have been interned, unless the persons themselves do not wish this. Representatives of the protecting power and delegates from the ICRC shall be granted opportunity to visit those who are interned and to speak with them privately. Further, all possible steps shall be taken to facilitate visits to the internees by other organisations or persons, such as diplomatic or consular authorities from internees' home states. The parties to a non-international conflict may choose to facilitate such visits, but they are not required to by international law. In some operations, it may nevertheless be decided that such persons shall be permitted to visit internees to the extent that security concerns permit.
- 6.111 Whenever feasible, the next-of-kin of interned persons shall be informed of their internment. In the event of extended internment, the internee's next-of-kin shall be given the opportunity to communicate with and visit the internee.<sup>68</sup> The extent to which visits and communication may take place depends on what is deemed appropriate on security grounds. For example, it will not be possible to permit visits by persons who are themselves regarded as a potential security risk, or if the situation indicates that the visitors' security cannot be guaranteed.
- 6.112 When exceptional security reasons render it necessary, it may be permitted, in a state's own and occupied territory, to restrict the right of individual internees to receive visits from and communicate with the outside world.<sup>69</sup> As a main rule, the advice of a legal adviser in the Norwegian Armed Forces must be sought in cases where such restrictions on internee rights are being considered.

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<sup>68</sup> *Geneva Convention IV, Articles 105–116.*

<sup>69</sup> *Geneva Convention IV, Article 5; Additional Protocol I, Article 45(3).*

## Legal review of security internment grounds

- 6.113 All internees are entitled to a legal review of the internment decision as soon as practicable, by a court or specially appointed tribunal. Such reviews shall be repeated at regular intervals for the duration of the person's internment. A review should be conducted every eight weeks, and as an absolute minimum at least once every six months.<sup>70</sup> The purpose of such periodic reviews is to evaluate whether the interned person continues to present a serious security risk. If this is no longer the case, the person shall be released as soon as possible.<sup>71</sup>
- 6.114 A special review body shall undertake the legal review of the basis for both initial and extended internment. The review body shall generally be a specially appointed tribunal; see the corresponding provisions in section 6.28 relating to prisoners of war.
- 6.115 Persons who are interned shall be given opportunity to challenge the legal basis for their internment before this body as soon as possible. In this context, the internee shall be made aware of the legal basis for internment and, if security concerns permit, the factual basis. An internee shall be allowed to receive assistance from another person (personal representative, etc.), and both the internee and this support person shall be permitted to attend and express their views during the review case. This shall also apply to any subsequent reviews of extended internment. Whom the internee may select as a support person will depend on the situation in the specific operation. Security conditions in the area of operation may indicate that it would be inappropriate to summon support persons from outside. Although an internee is entitled to be assisted by a fellow interned person, an alternative solution may be to appoint an officer of the internment force as the support person, provided that the internee consents to this.
- 6.116 It may be difficult to determine whether an interned person continues to present a threat to security if released. This assessment requires reliable information on the person's background, home territory and any persons or groups with which he is associated. Further, adequately updated information is required on how the person has acted while interned. For example, a person may have changed his political views during the period of internment, or he may have expressed a desire to exact revenge on those responsible for the internment. Further, the group or persons with whom the internee was previously associated may have been disbanded or become inactive or, in contrast, may still be participating directly in hostilities.

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<sup>70</sup> *Geneva Convention IV, Articles 43 and 78.*

<sup>71</sup> *Additional Protocol I, Article 75(3).*



- 6.117 Decisions taken by the body shall be announced to the internee and communicated to the ICRC. The interned person's next-of-kin shall be informed that the internee is in internment, where he is being interned, and that he is still alive, unless the security detainee objects to the communication of such information to his next-of-kin.
- 6.118 Internees who commit offences shall be subject to the laws applicable in the territory in which they are being interned.<sup>72</sup> Examples of offences may include violence towards or theft from other internees, sentries or visitors, and attempted escape. Such cases may be pursued as disciplinary or criminal matters. Disciplinary penalties shall be imposed by the commandant of the place of internment or by an official to whom he has delegated his disciplinary powers.<sup>73</sup> In the event of prosecution, the case shall be heard by the ordinary courts.

## Transfer

- 6.119 As stated above, internment is a national responsibility, and Norwegian forces must therefore either carry out the internment on their own or conclude agreements with other parties for some or all of the internment operation. Such agreements are concluded by the Ministry of Defence or the Ministry of Foreign Affairs on behalf of Norway, but may also be concluded by an international organisation such as NATO on behalf of an international force.
- 6.120 Internees may only be transferred to states that Norway has ensured will comply with the same international obligations that Norway is bound by regarding the treatment of such persons.<sup>74</sup> Internees shall not under any circumstances be transferred to a state where there is reason to believe that they will be subjected to torture; inhumane or degrading treatment or punishment, including the death penalty; or persecution due to their political views or religious beliefs.
- 6.121 The transfer of security internees to the authorities of another state shall only occur in accordance with national guidelines issued either generally for the operation or for the specific instance.

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<sup>72</sup> *Geneva Convention IV, Article 117.*

<sup>73</sup> *Geneva Convention IV, Article 123.*

<sup>74</sup> *Geneva Convention IV, Article 45.*

- 6.122 In international armed conflicts, the ICRC and any protecting power shall be informed of such transfers.

## Cessation of security detention

- 6.123 Security internment is not an alternative to criminal prosecution, and shall cease as soon as the conditions justifying security internment are no longer present.<sup>75</sup> An exception to this rule applies when persons are interned on suspicion of criminal offences and continued internment is required pending transfer to another authority.
- 6.124 Internees shall be released as soon as a court or board concludes that the grounds for internment no longer apply. For example, this may be because the person no longer is seen as intending to participate in actions that threaten security, or because the group with which the person was involved has been defeated and the risk of repetition is therefore substantially reduced. When hostilities or occupation have ceased, combatant parties who have internees in their custody shall ensure that the interned persons are returned to their most recent registered residence, or shall facilitate repatriation in some other way.
- 6.125 If, as required in the case of international armed conflicts, the ICRC and any protecting power have been informed that a person was placed in security detention, they shall also be informed when the internment ceases.

## III: Depriving criminals of liberty

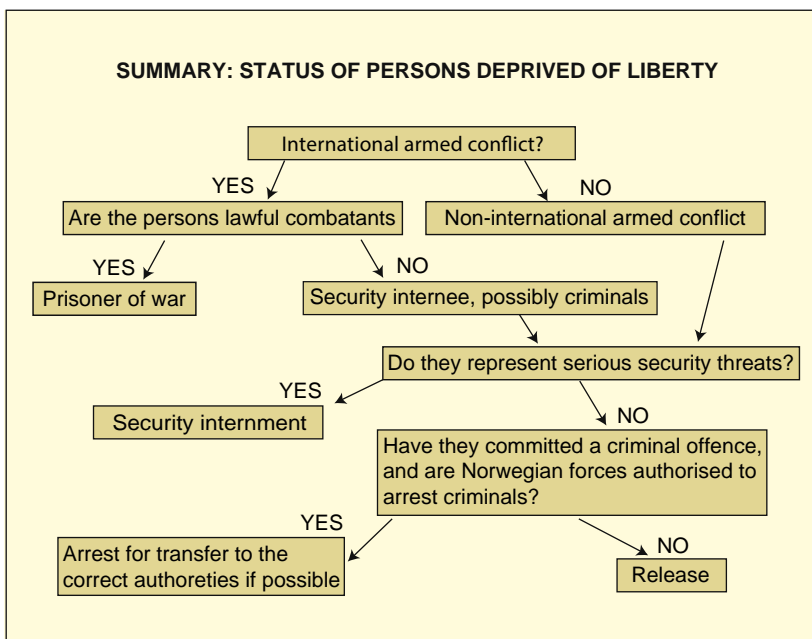
- 6.126 In armed conflict, situations may arise in which it is natural for military forces to take action against criminals. However, the clear main rule is that crime prevention is a civilian police responsibility. In international armed conflicts, such situations will primarily involve stopping or preventing serious criminal acts. In non-international armed conflicts, forces may additionally be tasked with maintaining public order, either alone or in cooperation with local security forces and police. In situations where Norwegian forces perform police-like duties in collaboration with local security forces and police, the Norwegian forces may be authorised to arrest persons suspected of acts prohibited by the laws of the country in question. Whether the forces are authorised to engage in police-like tasks and what such tasks may entail are issues that must be defined

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<sup>75</sup> *Geneva Convention IV, Articles 132–134, Additional Protocol I, Article 75(3).*

in operational plans, orders and directives. These will also specify the form and degree of force which may be used when performing such assignments.

- 6.127 The rules of engagement for an operation will usually provide military forces with a general authority to prevent the commission of serious crimes being committed by civilians. “Serious crimes” typically include murder, aggravated assault, sexual violence, serious theft, arson, serious vandalism, unlawful possession of weapons and serious disruption of public order with a risk that weapons may be used. See the discussion in sections 14.65–69 of whether Norwegian forces have not only a right, but also a duty, to investigate or prevent such crimes.
- 6.128 When persons are arrested in order to present them to an international or national court, they shall be transferred to the correct authorities as soon as possible. The identity of the correct transfer authorities, and the procedures for such internment and transfer, must be defined for each specific operation.





## 7

# Objects that are lawful targets, and protected objects

### Introduction

- 7.1 This chapter contains an overview of the conditions to be met in order for an object to be considered a lawful target, and identifies objects that are entitled to protection. Objects are lawful targets if they qualify as military objectives. Protected objects can be divided into two categories: objects which are not lawful targets and shall thus be protected against attack generally (general protection), and objects entitled to special protection. Where objects warrant special protection, greater care must be taken than with objects which “only” enjoy general protection. Special protection is normally granted to objects because they are particularly vulnerable in an armed conflict, or because of their function.

### Objects which are lawful targets

- 7.2 Only military objectives may be attacked. In other words, only military objectives are considered lawful targets. Military objectives are objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.<sup>1</sup> The conditions that qualify something as a military objective are elaborated below, and shall be treated as cumulative criteria which both must be met. If an attack on a lawful target may be expected to cause collateral damage, this damage must not be disproportionate in relation to the concrete and direct military advantage anticipated, as described in sections 2.19–25. This challenge is particularly relevant in connection with attacks on objects used for both civilian and military purposes.

### *Nature, location, purpose or use*

- 7.3 *Nature.* The term “nature” refers to the intrinsic character of the object, and includes all objects intended for use by military forces. For example, military vehicles are lawful military targets precisely because they are military. Other

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<sup>1</sup>Additional Protocol I, Article 52(2).

examples include weapons, armouries, command and control centres, barracks, fortifications and depots.

- 7.4 *Location.* An object's location may result in it being qualified as a lawful target. Such objects may include those which are not generally of a military nature, but which are located in, or themselves constitute, areas of strategic importance. For example, a mountain pass along an important supply route may be a lawful target because blocking or capturing the pass will prevent the enemy from using the route.
- 7.5 *Purpose.* The term "purpose" refers to the planned future use of an object. Examples may include a bridge or airport intended for military use.
- 7.6 *Use.* The term "use" refers to the current function of an object, i.e. how it is in fact used. Examples in this regard may include a civilian home used as military headquarters, a civilian vehicle used for transportation of troops, or a schoolyard used as a launch area for anti-aircraft fire.

### ***Effective contribution to military action***

- 7.7 The object's nature, location, purpose or use must make an effective contribution to military action. There is no requirement that the contribution must be linked to a specific operation: "military action" must be understood more generally. For example, an attack may be regarded as an effective contribution to achieving the end state of the operation. The contribution must nevertheless be direct rather than indirect. Examples of objects which make only an indirect contribution include a factory which through its production contributes to state revenues and thus supports warfare, and a plant producing foodstuffs sold to military forces. Examples of objects which make a direct contribution include a factory that produces weapons, ammunition or other types of military supplies, and a power plant supplying the military forces with electricity. In the case of objects which are military by nature, it will usually not be necessary to undertake a specific assessment of whether they make an effective contribution to military operations, as it is assumed that they actually do so. Attacks are normally permitted on such objects, provided that the rules of engagement for the operation in question do not say otherwise. For example, orders may be given to attack only military objectives located in a specific area.

### ***Definite military advantage***

- 7.8 The final requirement that has to be met in order for an object to be deemed a lawful target is that its total or partial destruction, capture or neutralisation would offer a definite military advantage. The primary purpose of attacking

lawful targets is to weaken the enemy's will and ability to conduct military operations, and thus to achieve a military advantage. A definite military advantage will for example be secured by destroying the enemy's military material so that the enemy's ability to conduct military operations is weakened.

- 7.9 Whether a definite military advantage exists shall be assessed on the basis of the advantage expected to be achieved in the circumstances at the relevant time. Whether an attack does in fact result in a military advantage is therefore irrelevant as long as the expectation prior to the attack was realistic and based on information about the target that was as reliable and as up-to-date as could feasibly be obtained at the relevant time. Nor will the assessment be affected, for example, by changes to the use of a building after an attack, or by the fact that unforeseeable events occur, such as an armoury's relocation that was impossible to discover.
- 7.10 A military advantage will not exist where, for instance, an attack will only produce a political or economic advantage. An example of political advantage is reducing support for the enemy among the civilian population or destroying radio towers used by the enemy to spread propaganda in support of its own forces. On the other hand, if radio towers are used for military purposes, for example in connection with the coordination/control of military forces, their destruction will offer a military advantage. If an attack that secures a military advantage will additionally confer a political advantage, the attack will be permitted provided that the political advantage is not the decisive factor in selecting the target.
- 7.11 The military advantage from an attack is intended to refer to the military operation as a whole, not just the limited local tactical advantage the attack is expected to achieve. For example, destroying a radio tower may not by itself provide a definite military advantage, but if all radio towers in an area are destroyed and the enemy's command and control system breaks down as a result, the overall destruction may afford a definite military advantage.
- 7.12 "Definite military advantage" means a clear, specific advantage; the term therefore excludes hypothetical, speculative or unclear advantages. For example, the destruction of a bridge located far from the site of hostilities will not be permitted unless there is information or other factors indicating that the enemy will in fact use the bridge.

### *The distinction between war support and the general war effort*

- 7.13 The requirements used in determining which objects constitute an effective contribution to military action and a definite military advantage mean that a distinction must be made between objects necessary for the conduct of military actions, i.e. war-supporting capabilities, and objects that provide only general support to the war effort (war-sustaining capabilities).
- 7.14 War-supporting capabilities, such as weapons factories, military ports and communications systems used for command and control purposes, will usually be lawful targets because they will qualify as military objectives. In other words, these are military objectives typically located some distance from the front, but which are nevertheless directly linked to military operations and therefore constitute lawful targets. These must be distinguished from objects which support only the general war effort. In most cases, the latter will not qualify as lawful targets, either because their contribution cannot be said to make a direct contribution to military action or because the military advantage of attacking a given object is insufficiently concrete. Examples of such objects include objects and facilities linked to food production or the financing of warfare, such as commercial trade and production of goods, e.g. oil exports. An attack with the sole intention of causing the enemy financial losses and thus weakening the enemy's military power in the longer term will be an attack against the general war effort, and therefore not permitted.
- 7.15 The precise distinction is not entirely clear. Accordingly, a discretionary assessment is required, based on the principles outlined in, among others, this chapter. It is also important to be aware that some other countries have chosen to treat economic targets that make an effective contribution to the enemy's war-sustaining capacity as lawful targets, even if they only provide indirect support and are therefore a form of general war effort. A historic example is the destruction of cotton during the American Civil War. The reason given for attacking cotton was that it was financing the warfare of the Confederate States.

### *Objects entitled to special protection*

- 7.16 Objects entitled to special protection, such as hospitals, historical buildings, religious buildings and dams may lose their protected status and qualify as lawful targets if they are used in such a way that the above criteria are met. In such cases, the civilian losses will often be concrete and extensive, and a particular military advantage will therefore be required in order for an attack to be considered proportionate and thus lawful. Objects enjoying special protection are discussed further in section 7.21 onwards.



### *Cases of doubt*

- 7.17 If there is doubt as to whether an object normally dedicated to civilian purposes, such as a place of worship, house or school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.<sup>2</sup> In other words, it will not be a lawful target. For further discussion of this issue, see sections 2.5–2.7.

## **Objects entitled to general protection**

- 7.18 Civilian objects shall not be the object of attack, and shall as far as possible be protected against the dangers arising from military operations, including against incidental damage, injury or loss. Civilian objects are all objects which are not military objectives.<sup>3</sup> Military objectives are defined above, in section 7.2 onwards.
- 7.19 Examples of civilian objects include:
- buildings and facilities used by civilians, provided that they are not used for military purposes, such as houses, blocks of flats, hospitals, offices, markets, shops, farms, schools, museums, churches and chapels, factories and workshops which do not manufacture or procure anything of military significance
  - means of transport such as civilian aircraft, trains and buses
  - food products, cultivated land and water sources
  - the natural environment
- 7.20 In some cases, objects which have become lawful targets will continue to be used by civilians, for example a strategically placed bridge (dual use). This does not preclude the bridge from qualifying as a lawful target, but it does mean that an attack is likely to cause loss to the civilian population that must be included in the assessment of whether the attack should be conducted. Civilian losses shall not be disproportionate compared to the military advantage anticipated. See sections 2.19–25 regarding proportionality in the context of attacks.

## **Objects and areas enjoying special protection**

- 7.21 While all objects which are not lawful targets are entitled to general protection against attack and against the effects of military operations, certain objects

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<sup>2</sup> *Additional Protocol I, Article 52(3).*

<sup>3</sup> *Additional Protocol I, Article 52(1).*

enjoy special protection. These are objects of particular importance to the civilian population and which, if attacked, would present an especially great risk of civilian losses. The potential civilian losses or damage are therefore concrete and serious, and a greater military advantage would be required for an attack to be considered proportionate and thus lawful. Attacks on such objects are therefore in principle prohibited, even if they may be said to be making an effective contribution to military action due to their location, purpose or use.

### ***Protection of cultural property and religious sites***

- 7.22 Cultural property and religious objects, and sites, are particularly vulnerable during armed conflict. Ethnic conflicts in particular have involved destruction of the enemy's cultural property, for example in an attempt to inflict psychological harm or to erase all traces of a culture. The bombing of Dubrovnik and the blowing-up of the famous bridge in Mostar in the former Yugoslavia are both examples in this regard.



*The historic bridge in Mostar was destroyed in 1993 by a tank attack during the war in Bosnia-Herzegovina, and was replaced by a suspension bridge for a period of time. Photo: Nikola Solić/REUTERS/NTB Scanpix.*

7.23 The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>4</sup> protects buildings and other objects of great cultural importance, and covers both movable and immovable cultural property such as monuments, archaeological sites, works of art, manuscripts, books and other objects or collections of scientific, artistic or historical significance.

7.24 Cultural monuments are defined as:

- a. Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above.
- b. Buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in point “a” (above) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in point “a”.
- c. Centres containing a considerable amount of cultural property as defined above in points “a” and “b”, and to be known as ‘centres containing monuments’.

7.25 Subject to the exceptions outlined below, the following are prohibited with respect to cultural property and religious sites:

- to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute peoples’ cultural or spiritual heritage
- to use such objects in support of military measures or actions, and
- to make such objects the object of reprisals<sup>5</sup>

7.26 Cultural monuments and their immediate vicinity may only be used for military

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<sup>4</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, with two additional protocols. As at 20 November 2012, Additional Protocol II has not been ratified by Norway, although this is primarily due to the need to adapt Norwegian criminal law and jurisdictional provisions to the requirements of the protocol. The material content of the protocol has therefore been incorporated into this manual.*

<sup>5</sup> *Additional Protocol I, Article 53.*

purposes in cases of imperative military necessity. The decision to invoke imperative military necessity shall be taken only by an officer commanding a force the equivalent of a battalion in size or larger, unless circumstances make it absolutely necessary to take the decision at a lower level of authority.<sup>6</sup> Typically, such a circumstance may be the time factor and/or lack of communications with a superior unit. If such a decision is taken, markings identifying such objects as cultural property shall be removed immediately, before the site is put to use for military purposes.

7.27 Military commanders thus have a duty to:

- explain to their soldiers the purpose and importance of the protective emblem for cultural property (see an example of the emblem below)
- ensure that their own orders include details on the places and objects in the area of operation which are to be protected as cultural property
- avoid damaging cultural property wherever possible and militarily defensible

7.28 Cultural monuments and religious sites may only be attacked if necessary for imperative military reasons,<sup>7</sup> for example when the enemy has placed military forces there that present an immediate threat to one's own forces and it is unfeasible to eliminate this threat without attacking the site.

7.29 In other words this is permitted if cultural property or religious sites are misused by the enemy in such a way that military necessity indicates that the threat must be eliminated. Examples of such misuse include placing a sniper position in a church tower or locating a command and control post in a museum. In such instances, only the degree of force needed to eliminate the threat shall be used, and all practical steps shall be taken to avoid damaging the object itself. In the example of the sniper position, this will mean directing the attack, if possible, against the church tower only, rather than the church as such. When circumstances permit, the use of force shall be communicated in advance so that the enemy has an opportunity to cease the misuse of the protected object without being attacked. The decision to attack cultural property shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, unless circumstances make it absolutely necessary to take the decision at a lower level of authority. Typically, such a circumstance may be the time factor and/or lack of communications with a superior unit.

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<sup>6</sup> *Additional Protocol II to the Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, Article 6(c).*

<sup>7</sup> *Report to the Storting No. 102 (1978–79), comment on Additional Protocol I, Article 53.*

- 7.30 In the case of attacks on lawful targets located in the vicinity of cultural property or religious sites, all feasible precautions shall be taken to avoid damage to these. This will influence the choice of methods and means of warfare, resulting perhaps in the use of ammunition that is more reliable and/or that has a smaller radius of damage than the ammunition that would otherwise have been chosen. The requirement to take precautions in attack is discussed in detail in chapter 2.

#### MARKING OF CULTURAL PROPERTY

In order to identify and recognise cultural property, a marking system has been introduced.

Marking should occur in peacetime so that the population becomes familiar with the system.

The emblem can be used alone or in a group of three, with two shields above the third.



- 7.31 The single emblem may only be used to identify cultural property under general protection or as identification on personnel and ID cards of personnel working to protect cultural property. The triple emblem may only be used on permanent cultural monuments enjoying special protection and in connection with the transportation of such.
- 7.32 There is no guarantee that all cultural property in an area of operation will be marked so as to make their entitlement to protection clear. This may be because signs have not been erected or, perhaps, have fallen down or been removed. Norwegian armed forces therefore have an independent duty to assess objects they wish to attack. Churches, mosques, temples and monuments will often be fairly easy to identify. Museums, art galleries and other typical pieces of cultural property may be more difficult to identify and a specific on-site assessment will be required. Where there is uncertainty as to whether an object enjoys special protection, it shall be investigated further, for example by requesting more information from observation posts, intelligence sources and a superior-level unit. The requirement is to take all feasible precautions to clarify the status of the object without exposing oneself or fellow soldiers to unnecessarily large risk.

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#### EXAMPLE 1: CULTURAL PROPERTY



Photo: Helge Sunde/Samfoto/NTB Scanpix.

Krosshaug, is a burial mound in Norway's Jæren district that contains one of the richest graves of a woman from the early Migration Period. On the mound is a stone cross dating from early Christian times in the period.

It is extremely important that such cultural property, which are not easily visible from aircraft or in the dark, be registered and marked on maps used by the armed forces in a conflict.

- 7.33 These rules on the protection of cultural property also apply during occupation, although in such cases certain special rules also apply. These are discussed in chapter 13.

#### *Protection of objects indispensable to the civilian population*

- 7.34 It is prohibited to attack, destroy, remove or render useless objects that are indispensable to the survival of the civilian population, if done for the purpose of denying them for their sustenance value to the civilian population.<sup>8</sup> Examples of such objects include foodstuffs, agricultural areas where foodstuffs are produced, crops, livestock, drinking water installations and supplies, and irrigation works.
- 7.35 The above provisions do not apply if objects are used:
- solely for sustenance of the enemy armed forces, or
  - in direct support of military action.

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<sup>8</sup> Additional Protocol I, Article 54.

- 7.36 Nevertheless, no attacks shall be made against objects that directly support military action if an attack is expected to cause the civilian population to have access to so little food and water that starvation will result or the civilian population will be forced to move away. For example, there may be cases where the only source of water for a village is also the source of water for a military camp. Although it may be permissible to bomb an agricultural area containing crops used by civilians if the area is being used by the enemy to advance with its forces, this will not be permitted if the bombing is likely to result in starvation or relocation.
- 7.37 However, starvation of, and attacks on foodstuffs and similar objects belonging to, the armed forces of the enemy are permitted.

### ***Protection of the natural environment***

- 7.38 As described in section 7.19, the natural environment shall generally be regarded as a civilian object, and the general principles governing the conduct of hostilities also apply to it:<sup>9</sup>
- The natural environment shall not be attacked unless the area in question qualifies as a lawful target.
  - Any destruction of all or parts of the natural environment is prohibited, unless military necessity requires otherwise.
  - No attack may be made against a military object if the attack is expected to cause excessive damage to the natural environment, i.e. damage which is disproportionate to the concrete and direct military advantage anticipated.
  - It is prohibited to manipulate the natural environment as a means of causing destruction or damage to a party where this will have widespread, long-term or severe consequences. Examples of manipulation of the natural environment include causing earthquakes, tsunamis and changes in the weather or climate.

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<sup>9</sup> *Additional Protocol I, Articles 35(3) and 55(1); Convention on the Prohibition of Military or any Hostile Use of Environmental Modification Techniques of 10 December 1976 (commonly abbreviated as ENMOD).*

- 7.39 In order for the natural environment to be a military object, it must satisfy the general requirements for qualifying as a military objective; see section 7.2 onwards. A common example is exploitation of the natural environment to achieve a military advantage. For example, a mountain pass along an important military supply route may be a military objective because blocking or capturing the pass will prevent the enemy from using the route. The same applies to a rock cavity used as an armoury, or a forest used to hide troop movements. However, it will be prohibited to burn down a forest or use herbicides extensively to prevent the enemy from finding cover, unless there are clear indications that the enemy is using or intends to use a specifically defined forest area for precisely this purpose.
- 7.40 In addition to the general rules on the protection of civilian objects, there are certain special rules on protecting the natural environment from the consequences of warfare. First, the natural environment shall be protected specifically against extensive, long-term or severe damage.<sup>10</sup> It is prohibited to employ methods or means of warfare that are intended or must be expected to cause extensive, long-term or severe damage to the natural environment. In other words, when there is a certainty or a risk that such effects will occur, an absolute prohibition applies that cannot be avoided by invoking military necessity, a condition that does not apply for other objects enjoying special protection.
- 7.41 Further, methods and means of warfare must be used with particular care to ensure the protection and preservation of the natural environment.<sup>11</sup> When conducting military operations, all feasible precautions shall be taken to avoid, or at least minimise, incidental damage, injury or loss to the natural environment. If an attack is expected to cause disproportionate damage to the natural environment, it shall not be launched, or shall be conducted using methods or means of warfare not expected to cause such damage.

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<sup>10</sup> *Additional Protocol I, Article 55.*

<sup>11</sup> *Additional Protocol I, Article 35(3).*



## EXAMPLE 2: DESTRUCTION OF OIL INSTALLATIONS

An oil installation such as an oil platform, oil refinery or oil well may constitute a lawful target during an armed conflict if it offers a definite military advantage in terms of preventing the enemy from using the oil resources for its armed forces.

If it is known or anticipated that an attack on such an installation will cause widespread, long-term and severe damage to the natural environment, the attack will be prohibited irrespective of military necessity. If, on the other hand, an attack will have less extensive consequences, it may be permitted if proportionate. In other words, consideration must be given to whether the expected environmental damage will be excessive relative to the military advantage anticipated i.e. the advantage of preventing the enemy from using the resources in an installation for its own military forces.

Decisions to attack such installations shall be taken at the operational level.

### *Protection of dams, dikes and nuclear power plants*

- 7.42 It is prohibited to attack dams, dikes and nuclear power plants if such an attack may cause the release of dangerous forces and consequent severe losses among the civilian population.<sup>12</sup> The purpose of this rule is thus not to protect the installations, but rather to protect the civilian population against the consequences of an attack, for example major flooding or the release of radioactive substances. Such attacks may also have negative consequences for a party's own military forces.
- 7.43 The only exception to the general rule prohibiting attacks is when such an installation is used in regular, significant and direct support of the enemy's military operations and an attack is the only feasible way to stop this.<sup>13</sup> Such a situation may exist if the enemy is deploying offensive weapon systems which are not solely intended for the defence of the installation. Moreover, the enemy may use an installation as cover and shelter for combatants or military materials, or may establish military command posts at such a location. In such instances, military necessity will indicate that one may depart from the general rule preventing attacks, and that all necessary military steps may be taken to

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<sup>12</sup> *Additional Protocol I, Article 56(1).*

<sup>13</sup> *Additional Protocol I, Article 56(2).*

stop such activities. However, given the aim of avoiding injury to the civilian population it is particularly important to take all feasible precautions, for example notification and evacuation. During the planning and conduct of any attack, all feasible precautions shall be taken to avoid the release of dangerous forces. Accordingly, this obligation will be a significant factor in the assessment of the methods and means to be used during an attack.

- 7.44 The parties to a conflict shall endeavour to avoid locating military objectives in the vicinity of such installations. Nevertheless, it is permitted to erect short-range defensive measures to protect such installations, such as anti-aircraft fire or sentries to prevent sabotage.
- 7.45 The prohibition against attacks only applies to the installations mentioned above, not to power stations in general, chemical factories or other dangerous installations. Any attacks on such installations are governed by the general provisions of the law of armed conflict, such as rules providing that only lawful targets may be attacked, that civilian losses must be proportionate to the military advantage anticipated, the protection of the natural environment and the prohibition against destruction not justified by military necessity.

### EXAMPLE 3: ATTACK ON ANTI-AIRCRAFT DEFENCES PLACED ON DAMS AND DIKES DURING THE VIETNAM WAR

During the US operation Rolling Thunder (1965–67), US President Lyndon B. Johnson declared that the United States would not attack any of the many dikes in North Vietnam, even though these could in many cases be said to be lawful targets. The reasons for holding back included not only the wish to avoid civilian losses, but also the negative propaganda such attacks would generate and the resulting political criticism.

However, according to US forces, these restrictions caused North Vietnamese forces to exploit the situation by placing anti-aircraft defences (weapons, radar, ground-to-air missiles) on such dikes. This was done both to defend the dikes and for use against US aircraft in general. It was also claimed that it was common practice to install/store fuel next to or on top of dikes in the knowledge that US forces were not permitted to attack the stores due to the risk of damaging the dikes.

During operation Linebacker I (1972), then-President Richard Nixon authorised attacks on military objectives located on or next to such dikes. However, restrictions were placed on the use of means and methods when conducting these attacks to minimise the risk of damaging dike structures and causing flooding and civilian losses as a result. These restrictions led to the use, among other things, of napalm, cluster conditions and anti-personnel weapons.

The important thing in this context is not which means of warfare were used, but the precautions that were taken before and during attacks to reduce the risk of damage to civilian infrastructure and the loss of civilian lives.

### *Undefended localities*

- 7.46 Undefended localities are areas deliberately left without military defences, with the aim of protecting the civilian population and civilian property against damage and destruction. Parties to a conflict are prohibited from attacking such areas.<sup>14</sup>
- 7.47 Undefended localities may be any inhabited place which is open for occupation and which the enemy's forces can thus take over, and which lies in an area

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<sup>14</sup>Additional Protocol I, Article 59; Convention respecting the Laws and Customs of War on Land of 18 October 1907 (Land War Regulations), Article 25.

where hostilities are ongoing. Such areas are created either when one party to a conflict unilaterally declares an area to be undefended, or through agreement between the parties. Such declarations and agreements shall, whenever possible, describe the geographical scope of the undefended localities.

7.48 Unless otherwise agreed with the enemy, the following conditions must be met in order for the enemy to be required to respect a declaration or agreement relating to an undefended locality:

- a. All combatants, as well as mobile weapons and mobile military equipment, must have been evacuated.
- b. No hostile use shall be made of fixed military installations or establishments.
- c. No hostile acts shall be committed by the authorities or by the population.
- d. No activities in support of military operations shall be undertaken in the area. Production of weapons, ammunition or other military equipment and the use of railways in the area to transport military equipment are among typical activities that shall not be undertaken.

7.49 The party to the conflict which has control of the undefended locality shall, if feasible, mark the area by installing signs to mark its boundaries and key access roads. The types of markings to be used will have to be agreed by the parties.

### *Demilitarised zones*

7.50 Demilitarised zones (DMZs) are areas which the parties have agreed to demilitarise and keep free of hostilities. These may include cities, towns or land areas separating two belligerent parties. The parties to a conflict are prohibited from extending their military operations to such zones.<sup>15</sup>

7.51 An agreement to demilitarise certain zones must be concluded expressly, although it may be either written or verbal. An agreement may be concluded directly between the belligerent parties, through any protecting power, or with the assistance of an independent humanitarian organisation such as the ICRC.<sup>16</sup>

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<sup>15</sup> *Additional Protocol I, Article 60(1).*

<sup>16</sup> *Additional Protocol I, Article 60(2).*

7.52 Unless otherwise agreed, the following conditions must be met in order for the enemy to be required to respect an agreement to demilitarise an area:<sup>17</sup>

- a. All combatants, as well as mobile weapons and mobile military equipment, must have been evacuated.
- b. No hostile use shall be made of fixed military installations or establishments.
- c. No acts of hostility shall be committed by the authorities or by the population.
- d. Any activity linked to the military effort must have ceased.

7.53 The types of acceptable activity in the area shall be agreed by the parties. The party which has control of “its” side of the demilitarised zone shall, wherever feasible, mark the area using pre-agreed signs. In particular, signs shall be erected to mark the area’s boundaries and/or access roads.<sup>18</sup>

### ***Prisoner-of-war camps and other installations for captured/interned persons***

7.54 Prisoner-of-war camps and other installations for captured or interned persons shall not be attacked.<sup>19</sup> To protect such camps and installations from attack and the effects of attack, they shall be located away from areas in which combat activity is taking place, and shall be separated from military installations which are lawful targets.<sup>20</sup>

7.55 In international armed conflicts, such installations shall be marked with the protective emblems “PW” (English: prisoners of war) and/or PG (French: *prisonnier de guerre*) or IC (English: Internment Camp). Such markings shall be highly visible from different angles, both on the ground and from the air. In addition, parties shall exchange information with the enemy regarding the locations of prisoner-of-war camps and detention camps.

7.56 There is no agreement, however, regarding a special official mark for installations used for internees or captured persons in non-international armed conflicts. In such cases it will nevertheless be possible to use the marking “IC”, although the protection of such installations will depend in large part on the parties’ knowledge that a given building is being used for internment purposes.

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<sup>17</sup> *Additional Protocol I, Article 60(3).*

<sup>18</sup> *Additional Protocol I, Article 60(4).*

<sup>19</sup> *Additional Protocol I, Articles 41 and 51.*

<sup>20</sup> *Geneva Convention III, Article 23; Geneva Convention IV, Article 83.*



## 8

# Means of warfare (weapons)

## Introduction

- 8.1 This chapter contains an overview of the prohibitions and restrictions relating to the choice and use of weapons. The general rules apply to all types of weapons, while the overview of special prohibitions is limited to the weapon types relevant to Norwegian forces. Weapons whose use is controversial are also covered.

## In general

- 8.2 Through various conventions and other international agreements, Norway has undertaken to respect and ensure compliance with international law rules on the use of particular types of weapons, methods and means of warfare. Such rules may also follow from customary international law. A number of obligations also concern procurement, manufacture, stockpiling and transfer. Although the obligations primarily apply during armed conflict, certain provisions also entail peacetime obligations.<sup>1</sup>
- 8.3 Restrictions on means of warfare can be divided into two categories: general and special. The general restrictions are expressed in rules prohibiting certain consequences or effects of using any means of warfare. Among other things, it is prohibited to cause superfluous injury or unnecessary suffering.<sup>2</sup> Special restrictions focus on the actual means of warfare, and either prohibit their use or introduce limitations on when and how they may be used. Examples of special restrictions include the prohibition against the use of chemical weapons and the prohibition against the use of projectiles designed to explode upon contact with the human body.
- 8.4 The prohibition against causing superfluous injury or unnecessary suffering is one of the most important general restrictions on the choice and use of means of warfare, and primarily concerns the protection of combatants. A weapon or type of ammunition is unlawful under this principle if its normal use will cause

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<sup>1</sup> *Direktiv om folkerettslig vurdering av våpen, krigføringmetoder og krigføringsevne* [Directive on Evaluation of Weapons, Methods and Means of Warfare According to International Law] of 18 June 2003, published by the Ministry of Defence, Article 1.

<sup>2</sup> *Additional Protocol I, Article 35(2)*.

injury or suffering beyond what is necessary to incapacitate enemy combatants (render them *hors de combat*). While it is an important restriction on warfare, the prohibition also affirms, conversely, that it is permissible to inflict on enemy combatants such injury and suffering as is necessary to render them *hors de combat*. This may of course entail serious injury or loss of life. Since the general prohibition against causing superfluous injury and unnecessary suffering has been framed so widely, in practice it is often difficult to achieve international agreement that particular types of weapons are to be regarded as prohibited under this rule. This is also why, in many cases, specific conventions or protocols are negotiated to regulate or prohibit defined weapons. Grenades that produce fragments which are non-detectable by x-ray (see section 8.25) are a good example of a type of weapon which has been specifically prohibited under this principle.

- 8.5 In this manual, “weapons” means any weapons system, weapon, ammunition, projectile, substance or similar object expected to be used in a combat situation, unless otherwise implied by the context. A legal assessment must be conducted in light of the weapon’s effects, based on expected normal use in combat. Weapons and ammunition must therefore be considered together. In order for something to be considered a weapon, its purpose must be to cause injury or damage to personnel or material, or otherwise to have a direct physical effect on these. For example, a sonic cannon intended solely to communicate information will not be regarded as a weapon. However, a sonic cannon may be regarded as a (less lethal)<sup>3</sup> weapon if the purpose of its use is, for example, to transmit painful high-frequency sounds (approaching the human pain threshold for loud noises) to disperse crowds or force them to withdraw.

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<sup>3</sup> *Direktiv for anskaffelse og bruk av mindre dødelige våpen for Forsvarets avdelinger* [Directive on the Procurement and Use of Less Lethal Weapons by the Norwegian Armed Forces], published by the Chief of Defence, 6 December 2007, section 2.1.



## COMPLETE BAN VS. GENERAL RESTRICTIONS

The use of certain weapons is completely banned. These prohibitions are based on the fact that such weapons either have an effect which insufficiently distinguishes between civilian and military targets/objects, or by their nature cause superfluous injury or unnecessary suffering. For Norwegian forces, therefore, the use of such weapons is generally – and always – prohibited. Examples include cluster munitions, anti-personnel mines, gas and biological weapons.

The use of lawful weapons is also subject to general restrictions on permitted forms of use. Lawful weapons may not be used in a manner that insufficiently distinguishes between civilians and lawful targets, or in a way that must be expected, by its nature, to cause superfluous injury or unnecessary suffering. In other words, such use will always constitute unlawful use of lawful weapons. Examples include breach of the proportionality principle and the use of incendiary weapons during an aerial attack on lawful targets located within a concentration of civilians.

### *General comments on how the principles influence the choice and use of weapons*

#### 8.6 General principles:

- The right of the parties to the conflict to choose means and methods of warfare is not unlimited.<sup>4</sup>
- Military necessity prescribes that enemy soldiers must be rendered *hors de combat*, but also that they must not be inflicted unnecessary suffering or superfluous injury.<sup>5</sup>
- A weapon shall not be indiscriminate, i.e. arbitrary and imprecise. It must be possible to use a weapon in a manner that distinguishes between combatants and non-combatants/civilians. This is also referred to as the principle of distinction.<sup>6</sup>
- It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term or severe damage to the natural environment.<sup>7</sup> See further discussion of protection of the natural environment in sections 7.38–41.

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<sup>4</sup> *Convention respecting the Laws and Customs of War on Land of 18 October 1907 (the Land War Regulations), Article 22; Additional Protocol I, Article 35.*

<sup>5</sup> *St. Petersburg Declaration of 1868; the Land War Regulations, Article 23; Additional Protocol I, Article 35.*

<sup>6</sup> *Additional Protocol I, Article 51(4).*

<sup>7</sup> *Additional Protocol I, Articles 35(3) and 55; Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques of 10 December 1976 (commonly abbreviated as ENMOD).*

### *Prohibition against indiscriminate attacks*

- 8.7 The prohibition against the use of weapons with an indiscriminate effect entails a prohibition against the use of weapons which in a given situation cannot be directed at a specific lawful target.<sup>8</sup> The content attributed to the expression “be directed at” has changed over time due to technological advances which have improved the level of precision. For example, weapons today offer greater precision than during World War II, and accordingly greater precision is demanded. In other words, technological developments and access to advanced weapons systems offering greater precision have altered the general view regarding when weapons are sufficiently precise. This applies particularly to the use of air-to-ground ammunition, but also to other weapon types. The prohibition against indiscriminate attacks does not, however, entail a general prohibition against firing a machine gun from a helicopter against combatants on the ground, provided that the fire is directed at them. Nevertheless, if combatants on the ground are located among civilians, an assessment is required of whether the use of a machine gun will entail a disproportionate loss of civilian life. If this is the case, the attack cannot lawfully be carried out.
- 8.8 Even though many of the world’s military forces, including the Norwegian Armed Forces, have improved their ability to deliver munitions with a high degree of precision, there is no general obligation to use such precision-guided ammunition, even if it is available. However, situations may arise in which the obligation to distinguish between lawful targets and civilians/civilian objects will mean that it is prohibited to attack using anything other than precision-guided munitions. In other words, if precision-guided munitions are not available, an attack will not be permitted. This may typically be the case where forces wish to attack lawful targets in a city which still has a civilian population and where targets are located close to civilian objects. The use of less precise weapons such as “dumb” bombs is therefore still permitted, provided that their use does not violate the law of armed conflict, including the proportionality and distinction principles.

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<sup>8</sup> *Additional Protocol I, Article 51(4)(b).*

### EXAMPLE 1: INDISCRIMINATE EFFECT

On 8 October 2008, the International Criminal Tribunal for the former Yugoslavia convicted Milan Martić of, among other things, having ordered an M-87 Orkan attack on targets in Zagreb on 2 and 3 May 1995. The attacks caused seven deaths and injured at least 214 civilians.

The M-87 Orkan is a Multiple Launch Rocket System (MLRS) with the following characteristics:

- Twelve launchers
- Each bomb contains 288 bomblets and employs cluster munitions.
- Range 50 kilometres
- The bomb has a margin of error of +/- 1,000 metres when used at maximum range.
- The bomblets cover an area of approximately 200 x 200 metres.

The court made note of the characteristics of the weapon, including the fact that it uses ammunition which cannot be guided after firing and spreads considerably. Accordingly, the court concluded that the weapon was not suited to hitting specific military targets in a densely populated area like Zagreb. Although the M-87 Orkan could not be said to be a weapon that in itself was prohibited at the time (this case preceded the Convention on Cluster Munitions), the example shows that it was prohibited to use the weapon in this situation because it hit both military targets and civilians or civilian objects indiscriminately.

## New weapons – requirement of an international law weapons review

- 8.9 In the study, development, acquisition or adoption of a new weapon, means or method of warfare, Norway is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by the law of armed conflict.<sup>9</sup>
- 8.10 The assessment to be carried out includes a duty to clarify whether an absolute prohibition applies. If no absolute prohibition applies, it must be clarified whether use of the weapon or ammunition in question would be prohibited in certain situations, for example against certain targets or at certain distances. In such cases, usage restrictions must be adopted.

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<sup>9</sup> *Additional Protocol I, Article 36; Direktiv om folkerettslig vurdering av våpen, krigførselsmetoder og krigførselsvirkemidler* [Directive on Evaluation of Weapons, Methods and Means of Warfare According to International Law] of 18 June 2003, Article 1(2).

- 8.11 The general assessment as to whether a weapon is prohibited *per se* because it causes superfluous injury or unnecessary suffering is not an assessment to be undertaken by individual soldiers in the case of approved weapons used by the Norwegian Armed Forces. A special committee assists the Chief of Defence with such assessments. The Chief of Defence's international law committee is a permanent advisory body which reports and is subordinate to the Chief of Defence.
- 8.12 Norwegian soldiers can thus be confident that weapons systems delivered to them have been evaluated and determined to comply with the law of armed conflict. Nevertheless, each individual user is responsible for ensuring that use of a weapon in a given situation complies with the general rules and principles of the law of armed conflict. This may include, for example, not using an otherwise lawful weapon in an arbitrary manner.
- 8.13 Norwegian forces shall not use other weapons or other ammunition than those delivered to them through the Norwegian Armed Forces' supply channels. In other words, Norwegian forces shall not use private weapons or ammunition. If a given situation raises the prospect that weapons or ammunition obtained other than through the Norwegian Armed Forces' supply channels may be used, such use shall require prior approval from the Chief of Defence or a person authorised by the Chief of Defence. As a rule, this will be Norwegian Joint Operational Headquarters. In such cases, it is assumed that these types of weapons and ammunition have received prior approval as described in section 8.10. In emergencies where there is no time or it is unfeasible to obtain such approval, individual soldiers may undertake this assessment themselves, based on self-defence considerations. For example, the need may arise to use weapons taken from an enemy during combat. For further discussion of this topic, see sections 9.13–17.

## Prohibited weapons

- 8.14 This section contains an overview of weapons which Norwegian forces are prohibited from using. However, the fact that Norwegian forces may not use a particular weapon does not mean that the forces of other nations operating alongside Norway in international operations are subject to a corresponding prohibition. It is a matter of which weapons conventions each individual state has ratified. See, for example, section 8.15 on cluster munitions. It is therefore important to be aware of Norway's international legal obligations. As mentioned above, the term "weapon" is used to describe any weapon system, weapons, ammunition, projectile, substance or similar object which is expected to be used in a combat situation, unless the context indicates otherwise.

## *Cluster munitions*

- 8.15 Norwegian forces are prohibited from using cluster munitions. This prohibition entered into force on 1 August 2010 in accordance with the Convention on Cluster Munitions.<sup>10</sup> States which have ratified the Convention on Cluster Munitions, including Norway, have undertaken never to use, develop, manufacture, acquire, store or transfer cluster munitions. Violation of these rules is a criminal offence under Norwegian law.
- 8.16 For countries which have not ratified the Convention on Cluster Munitions, there is no explicit prohibition against the use of this type of ammunition. However, their use must comply with the general principles of international law relating to the use of all types of weapons. In particular, it may be difficult to comply with the distinction and proportionality requirements when using such ammunition.
- 8.17 This means Norwegian forces are permitted to participate in exercises and multinational operations in which other countries use, or may potentially use, cluster munitions. Actions which only have a remote and indirect connection with other countries' use of cluster munitions will also be permitted. An example of such activity is operating from the same airbase as aircraft equipped with cluster munitions. However, the prohibition covers not only own personal use, but also complicity in acts violating the convention.<sup>11</sup> Asking for or assisting, encouraging or inducing the forces of another nation specifically to use cluster munitions in an operation or a given combat situation is therefore also prohibited. However, if Norwegian forces gain an advantage because, for example, allied forces use cluster munitions, this will not violate the Convention on Cluster Munitions.<sup>12</sup> Examples of acts which are prohibited (because they amount to complicity in such use) include the refuelling of aircraft which are known or should be known to be flying sorties equipped with cluster munitions, and assisting in the transport of such ammunition. General fuel deliveries to non-convention parties which may potentially use cluster munitions will not be classified as complicity, and is therefore permitted.

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<sup>10</sup> *Convention on Cluster Munitions of 30 May 2008; Act relating to implementation of the Convention on Cluster Munitions of 15 May 2009 No. 28.*

<sup>11</sup> *Recommendation to the Odelsting No. 9 (2008–2009), fifth paragraph of the Committee's comments.*

<sup>12</sup> *Proposition to the Odelsting No. 7 (2008–2009), section 4.2.6.*

## DEFINITION OF CLUSTER MUNITION

*A cluster munition as defined in the convention is a conventional munition designed to disperse or release explosive submunitions each weighing less than 20 kilograms.*

*"Cluster munition" does not mean the following:*

- *a munition or submunition designed to dispense flares, smoke, pyrotechnics or chaff, or a munition designed exclusively for an air defence role*
- *a munition or submunition designed to produce electrical or electronic effects*
- *a munition that, in order to avoid indiscriminate area effects and the risks posed by unexploded submunitions, has all of the following characteristics:*

- (a) each munition contains fewer than ten explosive submunitions*
- (b) each explosive submunition weighs more than four kilograms*
- (c) each explosive submunition is designed to detect and engage a single target object*
- (d) each explosive submunition is equipped with an electronic self-destruction mechanism*
- (e) each explosive submunition is equipped with an electronic self-deactivating feature*



Norwegian personnel disarming a cluster bomb in Iraq in 2003.

Photo: Torbjørn Kjosvold/Norwegian Armed Forces Media Centre.

## *Anti-personnel mines*

- 8.18 Norwegian armed forces are prohibited from using anti-personnel mines.<sup>13</sup> The prohibition under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their

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<sup>13</sup> *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 18 September 1997 (entered into force on 1 March 1999). The Norwegian act relating to implementation of the convention entered into force on the same date.*

Destruction (Convention on Anti-Personnel Mines) obliges ratifying states never under any circumstances to use, develop, produce, otherwise acquire, stockpile, retain or transfer anti-personnel mines. Violations of these rules are criminal offences under Norwegian law.<sup>14</sup>

- 8.19 Anti-personnel mines include all mines designed to be exploded through the presence, proximity or contact of a person. Mines which are designed to be exploded by the presence, proximity or contact of a vehicle are not regarded as anti-personnel mines, and may therefore be used as described in sections 8.32–36. The purpose of anti-handling devices on anti-vehicle mines is to prevent the mines from being deliberately disarmed. If an anti-handling device is constructed such that anti-vehicle mines may be exploded inadvertently through a person's contact or proximity, the mine may fall within the definition of anti-personnel mines and thus be prohibited to Norwegian forces.
- 8.20 Mines designed to be exploded manually or by remote control fall outside the definition of anti-personnel mine. Accordingly, their use against combatant personnel is permitted.
- 8.21 To be covered by the prohibition in the Convention on Anti-Personnel Mines, a mine must be “designed to” be exploded by the presence, proximity or contact of a person. Booby-traps are not generally regarded as anti-personnel mines according to the definition in this convention. This is partly because some booby traps do not contain explosives. However, the fact that the definition of anti-personnel mines covers all explosives designed to function in practice as anti-personnel mines means that such booby-traps will be regarded as anti-personnel mines for the purposes of the convention if they function as anti-personnel mines (see further discussion of the use of booby-traps in sections 8.45–50). The same applies to improvised explosive devices (IEDs), which will also be prohibited under the Convention on Anti-Personnel Mines if they are designed to be “exploded by the presence, proximity or contact of a person”.
- 8.22 The definition of “use” primarily encompasses physical use. Accordingly, it is unproblematic for Norwegian soldiers to participate in multinational operations in which certain allies are not bound by the prohibition in the Convention on Anti-Personnel Mines. However, they are prohibited from participating in the use of anti-personnel mines. This prohibition means that Norwegian forces are not permitted to assist, encourage or induce

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<sup>14</sup> *Act relating to implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of 17 July 1998 No. 54.*

anyone to take actions prohibited by the convention.<sup>15</sup> In principle, utilising the protection afforded by a minefield laid by others is not regarded as complicity to use within the meaning of the convention, unless deliberate steps are taken to facilitate this with the aim of securing such protection. Norwegian forces are also permitted to participate in joint military operations where the forces of other countries which are not signatories to the convention may use mines contrary to it.

- 8.23 The Convention on Anti-Personnel Mines permits the importation and storage of a limited number of mines banned under the convention for the purpose of training personnel in mine clearance. Norway has chosen not to store any anti-personnel mines under this provision.



*Examples of anti-personnel mines: Valmara and PMN models. Photo 1: Science Photo Library/NTB Scanpix, Photo 2: Dan Herrick/ZUMA/Corbis/NTB Scanpix.*

#### DEFINITIONS OF MINES

*“Mine” means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.*

*“Anti-personnel mine” means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, and that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.*

*“Anti-handling device” means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.*

<sup>15</sup> *Proposition to the Odelsting No. 72 (1997–1998), section 2.2.6.*



## *Expanding bullets*

- 8.24 There are different kinds of expanding bullets, and thus various terms for them, including hollow-point, soft-point and dum-dum. Generally, such projectiles will have a hard iron or nickel jacket which does not cover the entire core such that the bullet has a hole in its point or an open tip which normally causes the projectile to expand upon contact, for example with the human body. The prohibition also applies to projectiles which flatten easily inside the human body. The use of such projectiles as means of warfare in armed conflict is prohibited because they are designed to cause superfluous injury after contact with the human body, in excess of what is necessary to incapacitate the enemy.<sup>16</sup>



*Examples of prohibited and lawful small arms projectiles: hollow-point calibre 6.5 × 55 mm, soft-point calibre 7.62 × 51 mm and full-jacket calibre 7.62 × 51 mm. Photo: Norma AS.*

*The first two projectiles are examples of projectiles with an expanding effect which are prohibited from use as means of warfare. The use of full-jacket projectiles is permitted.*

### **USE OF EXPANDING BULLETS IN SITUATIONS UNRELATED TO HOSTILITIES**

*Use of expanding ammunition is permitted for law enforcement purposes by police forces, including in areas where an armed conflict is taking place. In special cases, this will also be permitted for Norwegian armed forces that are performing typical police work, for example in hostage rescue operations. Such permission shall only be granted in accordance with national guidelines for the individual operation. Before any use in a specific situation, a legal adviser in the Norwegian Armed Forces shall be consulted.*

<sup>16</sup> Declaration concerning Expanding Bullets, The Hague, 29 July 1899, the Land War Regulations Article 23(e).

### *Weapons which produce non-detectable fragments*

- 8.25 Weapons which produce non-detectable fragments cause injury primarily by leaving fragments in the human body which cannot be detected by x-ray.<sup>17</sup> Such weapons are prohibited. Ammunition containing plastics or other materials which cannot be discovered by x-ray is permitted only if such materials do not form part of the weapon's primary mechanism of injury. An example of prohibited ammunition is ammunition filled with glass splinters.

### *Blinding laser weapons*

- 8.26 It is prohibited to employ laser weapons specifically designed, as their sole combat function, or as one of their combat functions, to cause permanent blindness.<sup>18</sup> This prohibition does not bar the use of aiming devices or other devices employing lasers for their primary purpose, even if the device may potentially cause permanent blindness.

### *Chemical weapons*

- 8.27 The use of toxic chemicals and their precursors (chemical weapons) is prohibited.<sup>19</sup> Norway and other signatories to the Chemical Weapons Convention have undertaken not to:
- develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone
  - use chemical weapons
  - engage in any military preparations to use chemical weapons
  - assist, encourage or induce, in any way, anyone to engage in any activity prohibited to parties to the Chemical Weapons Convention
- 8.28 “Chemical weapons” means the following, together or separately:
- a. toxic chemicals and their precursors, except where intended for purposes not prohibited under the Chemical Weapons Convention, as long as the types and quantities are consistent with such purposes
  - b. munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in point “a” above, which would be released as a result of the employment of such munitions and devices
  - c. any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in point “b” above.

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<sup>17</sup> *Protocol I to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, 10 October 1980 (CCW).

<sup>18</sup> *Additional Protocol IV to the CCW*.

<sup>19</sup> *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (Chemical Weapons Convention) of 13 January 1993*.

## *Riot control agents*

- 8.29 The use of all types of chemicals as a means of warfare is prohibited.<sup>20</sup> This also applies to riot control agents (RCAs). As explained in the fact box below, there are some exceptions to the prohibition against the use of RCAs when the purpose is law enforcement, including in armed conflict.<sup>21</sup> A riot control agent is any chemical not included in the list of “chemical weapons” in the Chemical Weapons Convention, but which in humans can quickly cause sensory irritation or debilitating physical effects that disappear shortly after the end of exposure. Examples of RCAs include CS gas (tear gas), pepper spray and other chemical substances which render persons *hors de combat*, normally without causing permanent injury.

### **EXCEPTIONS FROM THE PROHIBITION AGAINST THE USE OF CHEMICAL WEAPONS**

*RCAs may be used for law enforcement purposes. This exception also applies in the case of law enforcement during armed conflict.*

*RCAs may not be used during combat or hostilities, although the rules do not prevent Norwegian armed forces from using such means during or outside of armed conflict for purposes and in ways comparable to those permitted to the police domestically. Examples of circumstances in which the use of such chemicals by armed forces may be permitted is in connection with civilian demonstrations, the dispersal of civilian crowds to clear the way, the maintenance of order in prison camps and in hostage rescue situations. Before Norwegian forces employ RCAs in an operation, they shall if possible consult a legal adviser in the Norwegian Armed Forces. Decisions regarding the use of RCAs and applicable conditions of use shall be made by the Ministry of Defence for each individual operation.*

*Norwegian forces shall only use RCAs approved by the Norwegian Armed Forces.*

## *Biological and bacteriological weapons*

- 8.30 The use of biological and bacteriological weapons is prohibited.<sup>22</sup> Examples include weapons designed to cause anthrax, Ebola or smallpox infection.

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<sup>20</sup> *Chemical Weapons Convention, Article I(5).*

<sup>21</sup> *Chemical Weapons Convention, Article II(9).*

<sup>22</sup> *Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, from 1972.*

## ***Poisons***

- 8.31 The use of poisons or poison weapons as a means of warfare is prohibited.<sup>23</sup> This prohibition applies not only to the use of such weapons directly against persons, but also to indirect use such as the poisoning of drinking water sources, food and similar objects. The prohibition does not prevent the use of weapons which may incidentally cause poisoning or where poisoning is not an objective of the construction of the weapon or its ordinary use.

## **Weapons subject to usage restrictions**

This part provides an overview of weapons which are subject to restrictions on use by Norwegian forces. The forces of other states may be subject to different restrictions, depending on which conventions those states have ratified.

### ***Restrictions on the use of anti-vehicle mines***

- 8.32 “Anti-vehicle mine” refers to any mine designed to explode in the proximity of or upon contact with a vehicle. The use of anti-vehicle mines is permitted, provided that special precautions are taken to minimise any indiscriminate effect of such mines to prevent civilians from being injured by them.<sup>24</sup> An anti-vehicle mine that meets the definition of an anti-personnel mine (designed to be detonated by the incidental presence or contact of a person) will be prohibited.
- 8.33 The use of anti-vehicle mines is permitted as long as they do not incorporate a mechanism or device specifically designed to detonate the mine when a mine detector is used in its proximity.<sup>25</sup>

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<sup>23</sup> *Rome Statute of the International Criminal Court, Article 8(2)(b)(vii); the Land War Regulations Article 23.*

<sup>24</sup> *Revised Protocol II to the CCW (revised 3 May 1996).*

<sup>25</sup> *Revised Protocol II to the CCW, Article 3(5).*

- 8.34 Self-deactivating mines may be used provided that they are not equipped with an anti-handling device that functions even after the mine itself has been deactivated. “Self-deactivating” means that the mine is rendered inoperable by the irreversible exhaustion of a component, for example a battery, that is essential to the operation of the mine. “Anti-handling device” means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to move or tamper with the mine.<sup>26</sup> The purpose of anti-handling devices on anti-vehicle mines is to prevent their intentional disarming. If an anti-handling device is designed such that the anti-vehicle mine may be exploded inadvertently through a person’s contact or proximity, the mine may fall within the definition of an anti-personnel mine and thus be prohibited for use by Norwegian forces.
- 8.35 All feasible precautions under the circumstances ruling at the time shall be taken to protect civilians against the effects of anti-vehicle mines. Factors to be assessed include, but are not limited to:
- a. the short and long-term effects of the anti-vehicle mines on the local civilian population for the duration of the minefield’s existence
  - b. potential measures to protect civilians, such as fencing, signs, warnings and surveillance
  - c. other possible alternatives
  - d. the short- and long-term military need for a minefield
- 8.36 Effective advance warning shall be given of any emplacement of anti-vehicle mines which may affect the civilian population, using signs, information and similar measures.<sup>27</sup> All information about minefields shall be registered as precisely as possible. This includes the emplacement, timing of emplacement, type, method of emplacement, any anti-handling devices, any self-destruction dates and other relevant information. The rules on clearance, destruction, etc. of mines are discussed in sections 8.61–64.

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<sup>26</sup> *Revised Protocol II to the CCW, Article 2.*

<sup>27</sup> *Revised Protocol II to the CCW, Article 3(11).*



*Example of an anti-vehicle mine of the type Claymore M-100.  
Photo: Torgeir Haugaard/Norwegian Armed Forces Media Centre.*

**THE USE OF ANTI-VEHICLE MINES IS PERMITTED PROVIDED THAT:**

- *they are not designed to detonate when a mine detector is used*
- *they are not designed to detonate through the incidental presence or touch of a person*
- *their anti-handling device is deactivated when the mines are deactivated, and*
- *they are cleared, removed or destroyed, or arrangements are made for their destruction, once hostilities have ended*

### ***Restrictions on the use of naval mines***

- 8.37 The use of naval mines is permitted, subject to certain restrictions.<sup>28</sup> As in the case of other weapons, there is a duty to use mines in such a way that they do not indiscriminately affect civilian, military or combatant, and neutral vessels. This requires some degree of control over the mines, and influences where mines may be laid.

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<sup>28</sup> *San Remo Manual on International Law Applicable to Armed Conflicts at Sea 1995 (SRM), Article 80 onwards; Convention relative to the Laying of Automatic Submarine Contact Mines of 18 October 1907.*

- 8.38 When naval mines and minefields are used at sea, international warnings must be given to warn and protect civilians and neutral ship traffic. Warnings in the form of a Notice to Mariners and notice to the International Maritime Organization (IMO) are normally sufficient, although the need for other warnings must be considered in each specific case. The geographical location of a minefield shall be registered to ensure accurate warning and to facilitate subsequent removal and/or deactivation.
- 8.39 Naval mines can be either free-floating or anchored. In the case of free-floating mines, it must be possible to verify their location at all times, and they must be capable of disarming themselves no later than one hour after control of them is lost. If they do not have this function, their use will be prohibited. Anchored mines must disarm themselves as soon as they lose their anchorage. If effective control of mines is lost, and it is therefore impossible to ensure that the mines will only be employed against lawful targets, an international warning to this effect shall be issued.
- 8.40 Mines may be laid in the enemy's internal waters, territorial waters and archipelagic waters, as well as international waters. However, mines shall not be placed in neutral waters. Minelaying shall not hinder the free passage of ship traffic from neutral states, and appropriate consideration should be given to the lawful use of the high seas, including by arranging safe routes for ship traffic from neutral states. The use of minefields to channel neutral ship traffic is permitted, but generally not so as to prevent such traffic from passing through international straits or archipelagic waters. Further, minelaying shall not hinder transit between neutral waters and international waters.
- 8.41 Minelaying in a state's own territorial waters (including archipelagic waters), is permitted. Territorial waters may be temporarily closed to innocent passage on security grounds. Any closure decision shall be made by the Ministry of Defence.
- 8.42 Minelaying in international waters is permitted in areas where maritime operations are taking place, but all feasible precautions shall be taken to keep the sea lanes of neutral states open for traffic. In connection with minelaying, appropriate consideration shall be given to the rights of affected coastal states. Account shall also be taken of the marine environment. If minelaying occurs within the exclusive economic zone of a neutral state or on the continental shelf of such a state, the neutral state shall be notified of the minefields and their placement.
- 8.43 Once active acts of war have ceased, the parties to an armed conflict shall do their utmost to remove or disarm the mines they have laid. If mines have been

laid in the territorial waters of the enemy, information on their location shall be provided to facilitate their clearance.

- 8.44 It is prohibited to place nuclear naval mines outside one's own territorial waters, both in peacetime and during armed conflict.<sup>29</sup>

### ***Restrictions on the use of booby-traps, mines and "other devices"***

- 8.45 "Booby-trap" means any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act.
- 8.46 "Other devices" means manually-emplaced munitions and devices including improvised explosive devices designed to kill, injure or damage and which are activated manually, by remote control or automatically after a lapse of time. Directional mines triggered manually or by remote control fall within this definition.
- 8.47 It is prohibited to use booby-traps, mines and other devices which are in any way attached to or associated with objects or persons entitled to special protection under the law of armed conflict, or which are attached to objects which are highly likely to attract civilians. Examples of such objects include:<sup>30</sup>
- a. internationally recognised protective emblems, signs or signals
  - b. sick, wounded or dead persons
  - c. burial or cremation sites or graves
  - d. medical facilities, medical equipment, medical supplies or medical transportation
  - e. children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children
  - f. food or drink
  - g. kitchen utensils or appliances except in military establishments, military locations or military supply depots
  - h. objects clearly of a religious nature
  - i. historic monuments, works of art or places of worship which constitute peoples' cultural or spiritual heritage, and
  - j. animals or their carcasses

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<sup>29</sup> *Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil thereof of 11 February 1971.*

<sup>30</sup> *Revised Protocol II to the CCW, Article 7.*



- 8.48 It is also prohibited to use mines, booby-traps or other devices which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors.<sup>31</sup>
- 8.49 Booby-traps, mines and other devices shall not be used in any city, town, village or other area containing a similar concentration of civilians where combat between ground forces is not currently taking place or does not appear to be imminent, unless either:
- a. they are placed on or in the close vicinity of a military objective, or
  - b. measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.<sup>32</sup>
- 8.50 All information about booby-traps, mines and other devices shall be registered as precisely as possible. This includes the emplacement, timing of emplacement, type, method of emplacement, any anti-handling devices, any self-destruction dates and other relevant information. The rules on clearance, destruction, etc. of booby-traps, mines and other devices are discussed in sections 8.61–64.

### *Restrictions on the use of incendiary weapons*

- 8.51 “Incendiary weapon” means any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or combination thereof, produced by a chemical reaction of a substance delivered on the target. Incendiary weapons can take the form of, for example, flame throwers, grenades, rockets, mines, bombs and other containers of incendiary substances.
- 8.52 Although the use of incendiary weapons is not prohibited, certain restrictions on their use follow from both the principles of distinction and proportionality under customary international law and Norway’s treaty obligations.<sup>33</sup>
- 8.53 Incendiary weapons do not include munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems.

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<sup>31</sup> *Revised Protocol II to the CCW, Article 3(5).*

<sup>32</sup> *Revised Protocol II to the CCW, Article 7(3).*

<sup>33</sup> *Protocol III to the CCW.*

Nor do incendiary weapons include munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect. Examples in this respect include armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

8.54 It is specifically prohibited to use incendiary weapons as follows:

- To make any lawful target located within a concentration of civilians or civilian objects the object of attack by air-delivered incendiary weapons.
- To make any lawful target located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such lawful target is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the lawful target and to avoiding, and in any event to minimising, incidental loss of civilian life, injury to civilians and damage to civilian objects.
- To make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage lawful military targets (personnel and/or objects), or are themselves lawful targets, for example because they hinder an advance or an attack on the enemy.
- To make personnel the object of attack by incendiary weapons except when it is unfeasible to use a different lawful weapon to render such personnel *hors de combat*. Weapons with an incendiary effect shall therefore generally only be used against personnel located inside armoured vehicles, in fortified positions (such as bunkers), or in similar locations. The Norwegian Armed Forces do not have incendiary weapons designed primarily for use against personnel.

8.55 In some cases, therefore, specific restrictions apply, such as the prohibition against using air-delivered incendiary weapons in areas inhabited by civilians. The absolute prohibition against such use of incendiary weapons will apply even if, in a specific situation, they are regarded as the least risky option with respect to civilian losses, for example where a factory producing chemical weapons is to be attacked. It may well be that an incendiary-bomb attack will be the best way to spare the civilian population because the chemicals will hopefully burn up and thus be prevented from spreading across a wider area.

However, since the prohibition is absolute, this option will never be permissible in areas inhabited by civilians.

- 8.56 Phosphorus munitions designed to set fire to targets, such as fuel and ammunition stores, or to generate smoke, may be used for their purpose subject to the general restrictions upon incendiary weapons. Phosphorus munitions shall not be used directly against personnel. The Norwegian Armed Forces do not have any phosphorus munitions in their arsenals.

### *Explosive projectiles*

- 8.57 The use of explosive and incendiary projectiles primarily designed for use against personnel is prohibited.<sup>34</sup>
- 8.58 The reason for the prohibition is that projectiles which explode upon contact with or after entry into the human body will cause unnecessary suffering or superfluous injury. Such projectiles are therefore also prohibited under the principles of customary international law prohibiting the infliction of unnecessary suffering or superfluous injury on an enemy. The prohibition applies both to projectiles designed to have such effect and projectiles that have this effect in practice.
- 8.59 Ammunition types which satisfy one of the following two definitions will violate the prohibition against the use of explosive projectiles against personnel:
- that the projectile has been designed, i.e. is intended, for use against personnel and is designed or intended to cause injury through the explosion of the projectile inside the human body, or
  - that the projectile is designed for use as an anti-personnel munition, and normally to explode inside the human body
- 8.60 In recent years, there has been considerable discussion of the use of Norwegian-produced 12.7-mm multi-purpose ammunition (MP ammunition) against persons. There is no prohibition under international law against the use of 12.7-mm MP ammunition, since such ammunition is not designed to explode inside the human body. 12.7-mm MP ammunition functions almost like a hard-jacket ammunition of the same calibre when used against persons, and will normally not explode inside the body. Even though there is no international law prohibition against either the production or use of such ammunition, Norway's position is that this ammunition should generally only

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<sup>34</sup> *St. Petersburg Declaration of 1868.*

be used against hard and semi-hard targets (side effects on soft targets may be accepted), and that Norwegian forces must comply with this principle in connection with the delivery of ammunition types, assignment of missions, etc. Exceptional use against persons, for example in self-defence situations in which no other types of ammunition are available, will be permitted.

## Obligation to clear, remove or destroy explosive remnants of war

- 8.61 States have an obligation to clear, remove or destroy explosive remnants of war once an armed conflict has ended.<sup>35</sup> In this context, “explosive” means conventional munitions containing explosives, including mines, booby-traps and other devices.<sup>36</sup> Typical examples include unexploded munitions, abandoned and unused ammunition, and mines.
- 8.62 After the cessation of active hostilities, and as soon as feasible, parties shall take the following measures in affected territories under their control:
- survey and assess the threat posed by explosive remnants of war to the local population
  - assess and prioritise needs and practicability in terms of marking and clearance, removal or destruction
  - mark and clear, remove or destroy explosive remnants of war wherever practicable, and
  - take steps to mobilise resources to carry out these activities
- 8.63 Where a party does not have control over a given territory, it shall whenever feasible support such activities through the provision of, for example, technical, financial, material or human resources. This may be done bilaterally or through a third party agreed on by the parties, such as the UN. This obligation applies to explosive remnants of war resulting from the activities of one’s own forces.
- 8.64 Wherever feasible, information on the use of explosives and explosive remnants shall be registered and filed. The purpose of keeping such information includes facilitating rapid marking and clearance, removal or

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<sup>35</sup> *Protocol V to the CCW*.

<sup>36</sup> *Protocol V to the CCW, Article 3. Although booby traps incorporating mines and other devices fall outside the scope of this protocol, similar rules will generally apply to such objects under Protocol II to the CCW and the Convention on Anti-Personnel Mines of 1997.*

destruction of explosive remnants of war, and to provide information on risks. The release of such information to the party in control of the relevant territory and the civilian population in this territory will be decided by Norwegian Joint Operational Headquarters.<sup>37</sup>

**INFORMATION TO BE RECORDED FOR POTENTIAL SUBSEQUENT RELEASE**

*The following information shall be registered about undetonated explosives:*

- *the positions (as precise as possible) of known and likely undetonated explosives*
- *the types and approximate numbers of explosives used in the target areas for the explosive, and*
- *how the explosives can be identified, including the colour, size, shape and other relevant characteristics, and how the explosives should be handled*

### ***Less-lethal weapons***

8.65 No international agreements deal with less-lethal weapons as a separate category, although the general rules on weapons as described in section 8.1 onwards also apply to this type of weapon. In addition, some less-lethal weapons are subject to special prohibitions, for example the prohibitions against the use of gas weapons as a means of warfare (see sections 8.27–28), and against the use of blinding laser weapons (see section 8.26). Moreover, the Norwegian Armed Forces have issued their own general guidance on less-lethal weapons.<sup>38</sup>

8.66 “Less-lethal weapons” refers to weapon systems specifically designed and developed to render personnel unable to fight or resist attack, but which carry little risk of a deadly outcome or permanent injury. They also include weapons systems especially designed and developed to neutralise material with a minimum of undesirable damage to the material or damage to the environment. The following are examples of less-lethal weapons:

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<sup>37</sup> *Protocol V to the CCW, Article 4.*

<sup>38</sup> *Forsvarssjefens Direktiv for anskaffelse og bruk av mindre dødelige våpen for Forsvarets avdelinger* [The Chief of Defence’s Directive on the Procurement and Use of Less Lethal Weapons by the Norwegian Armed Forces] of 2007.

- gas weapons such as CS gas or OC pepper spray
- striking weapons such as clubs and batons
- electric shock weapons
- water cannon
- sonic weapons
- certain kinetic and area-denial weapons systems, such as those that fire projectiles with less-lethal kinetic effects directly at targets, including shotguns firing rubber bullets and similar projectiles or ammunition with an area-denial effect, 40-mm grenade launchers firing CS gas, etc.

Norwegian forces shall only use less-lethal weapons approved and supplied by the Norwegian Armed Forces.

### ***Controversial, but not prohibited weapons***

- 8.67 *Depleted-uranium projectiles.* There is no specific prohibition against the use of depleted-uranium projectiles. However, Norway's position is that Norwegian forces shall not use such projectiles. Moreover, Norwegian forces do not have such projectiles in their arsenals.
- 8.68 *High-velocity weapons.* There is no specific prohibition against the use of high-velocity weapons. However, weapons firing projectiles at very high velocities may well cause superfluous injury or unnecessary suffering when used against personnel. Such considerations are taken into account by the Norwegian Armed Forces when adopting new types of weapons and ammunition.
- 8.69 *Shotguns.* The use of shotgun ammunition against persons is permitted.
- 8.70 *Flechette grenades.* Flechette grenades, i.e. grenades which disperse large numbers of metal darts at a high velocity, may in some instances fail to comply with the general principles of the law of armed conflict. In particular, such weapons must be evaluated against the requirement that a weapon must be capable of directing at a specific lawful target.

## *PROHIBITED WEAPONS AND RESTRICTIONS*

*The following weapons are prohibited under all circumstances:*

- *poisons and poison weapons*
- *toxic chemicals and their precursors*
- *bacteriological weapons*
- *anti-personnel projectiles that explode inside the human body*
- *anti-personnel projectiles that expand inside the human body*
- *weapons that release non-detectable fragments into the body*
- *blinding laser weapons*

*The following weapons are prohibited by a significant number of countries, including Norway:*

- *free-floating naval mines which are not disarmed within one hour*
- *anti-personnel mines (except mines which are triggered manually or by remote control)*
- *cluster munitions*

*The following weapons are permitted, but are subject to special rules relating to their use:*

- *anti-vehicle mines and other mines which are not anti-personnel mines or cluster munitions*
- *incendiary weapons*
- *substances that modify the environment (certain pesticides)*

*The following weapons are controversial, but not prohibited:*

- *depleted-uranium projectiles*
- *high-velocity weapons*
- *shotguns*
- *flechette grenades*
- *nuclear weapons*
- *certain non-lethal weapons*





# 9

## Methods of warfare

### Introduction

- 9.1 “Methods of warfare” refers to attacks and other activities which have the aim of negatively affecting the enemy’s military operations or military capacity.
- 9.2 In armed conflict, restrictions apply to the choice of means and methods by the belligerent parties.<sup>1</sup> This chapter discusses permitted and prohibited methods of warfare in particular, whereas the means of warfare (weapons) are discussed in chapter 8. However, these two terms are closely related. As stated in the chapter on means of warfare, there are weapons which are inherently prohibited for Norwegian forces, while others are generally permitted. For means of warfare to be permitted, they must be used in a manner consistent with the law of armed conflict. For example, it is always prohibited to use weapons in a manner that causes the enemy superfluous injury or unnecessary suffering, and weapons may not be used in a way that distinguishes insufficiently between lawful targets and civilians or other protected persons or objects. In these two examples, therefore, it is the method that causes the weapons to be prohibited, rather than the weapons themselves.
- 9.3 This chapter covers two main categories: permitted methods and prohibited methods. The overviews are not exhaustive, but the primary emphasis is on the methods most relevant to Norwegian forces. An in-depth discussion of the relatively new topic of cyber operations is included at the end of the chapter.

### Permitted methods

- 9.4 The distinction between permitted methods of warfare and prohibited methods of warfare is not always clear. Moreover, in the case of some methods of warfare, the permitted and prohibited methods appear quite similar (for example ruses of war and perfidy). This chapter does not review all methods of warfare. The focus is on lawful methods of warfare which may be confused with prohibited methods, or which must satisfy special conditions in order to be lawful.

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<sup>1</sup>*Additional Protocol I, Article 35.*

## *Ruses of war*

9.5 “Ruses of war” is a collective term for measures which may lawfully be used to mislead or induce the enemy either to refrain from taking action when he should or to cause him to act carelessly. However, ruses of war must be implemented in a manner that does not breach other rules of the law of armed conflict, including perfidy as described in sections 9.23– 25. The following are examples of ruses of war (the list is not exhaustive):

- Deception operations. For example, a false attack may be made in an area to cause the enemy to believe that a major attack will be launched there, causing him to move reinforcements there while the actual attack will take place in another location, which it is hoped will then be easier to capture.
- Misinformation. Information that is expected to reach the enemy in some form and which is deliberately incorrect, for example information about planned attacks, the positioning of forces, future plans, etc.
- Creating false military codes and false electronic, optical or acoustic signals to mislead the enemy, for example communicating by radio with forces that do not exist or arranging for the enemy to obtain false codes. Such signals shall not be emergency signals or express a desire to surrender.
- The use of “decoys”, such as vehicles, vessels, buildings or other structures presented as lawful targets but which in reality are replicas made of cardboard, plastic or other less valuable materials.
- The use of camouflage. Even though soldiers often camouflage themselves to increase their chances of finding a position from which they can kill, injure or capture an enemy, camouflage does not amount to perfidy. This is because camouflage does not give the enemy any reason to believe that a person is entitled to protection under the law of armed conflict. In other words, military forces may attempt to make themselves invisible in the landscape, but cannot seek to become invisible among civilians by pretending to be civilians. Special precautions have to be taken when camouflaging medical units and medical installations. These are further described in sections 5.26– 29.
- Providing incorrect information during interrogation as a prisoner of war or internee.
- In the case of warships, in contrast to land-based means of transport and aircraft, it is permitted to sail under a false flag to lead the enemy to believe that the warship is not a lawful target. If a false flag is used, the correct flag must be raised before entering combat.

#### EXAMPLE 1: PERFIDY VERSUS LAWFUL RUSES OF WAR DURING THE FIRST GULF WAR (1991–92)

During this war, it was reported that Iraqi forces, allegedly dressed in civilian clothing, on several occasions expressed pleasure at the arrival of US ground forces only to then attack them. This is an example of perfidy, since the Iraqi forces exploited their perceived status as protected persons to conduct an ambush.

At the beginning of a tank battle towards the end of the war (January 1992), Iraqi tanks entered the city of Ras Al-Khafji with their cannon facing backwards. Only at the moment they came into contact with enemy forces did they turn their cannon and open fire. After the event, it was speculated in the media whether this constituted perfidy. It did not. Reversed cannon are not necessarily a sign of peaceful intentions or desire to surrender. The Iraqi forces attempted to mislead the enemy, but not in a way that constituted perfidy. Accordingly, this is an example of a lawful ruse of war.

(Source: Gen. Sir Peter de la Billiere, Storm Command and US DoD, Conduct of Persian Gulf War, Appendix O, page 621.)

### *Siege*

- 9.6 Siege describes the situation in which a fortified area that may also contain civilians has been surrounded and a high degree of control has been established over the movement of personnel – both civilian and military – in and out of the area. The siege of such an area is permitted in principle, although various precautions must be taken during actual siege and in the event of any attack on the sieged area. These are reviewed below.
- 9.7 Military commanders have a duty to take all feasible precautions to warn the civilian population of an upcoming attack on the sieged area. In this way the civilian population will be given an opportunity to evacuate.<sup>2</sup>
- 9.8 The rules on proportionality and distinction, and the requirement to take precautions prior to and during attacks, also apply in cases of siege. All feasible precautions shall be taken to avoid damage to objects which are not lawful targets, such as hospitals, cultural monuments, religious sites and schools, provided that these are not being used in a way that makes them a lawful target. Civilians and protected objects may lose their protection, for example when enemy forces have located weapons or military vehicles on or near them. For further discussion of protected objects, see chapter 7.<sup>3</sup>

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<sup>2</sup> *Additional Protocol I, Article 57(2).*

<sup>3</sup> *Regulations concerning the Laws and Customs of War on Land (the Land War Regulations) – 18 October 1907, Article 27.*

- 9.9 It should also be noted that attacks on undefended localities are prohibited.<sup>4</sup> A more detailed description of the rules applicable to undefended localities is provided in section 7.47–50.

## *Sabotage*

- 9.10 “Sabotage” means a destructive act of some kind. However, the term is commonly used in a narrower sense, to refer to destructive actions taken behind enemy lines or in occupied territory against an occupying power. Sabotage is permitted as long as the target of the sabotage is a lawful target.<sup>5</sup> Saboteurs are personnel who primarily operate behind enemy lines, typically special forces, to conduct actions that destroy enemy targets. Such actions are also referred to as direct actions.
- 9.11 As regards saboteurs operating in occupied territory, one special exception applies from the requirement to distinguish themselves from the civilian population through the wearing of uniforms or distinctive signs.<sup>6</sup> The exception states that an armed combatant will retain his status as a lawful combatant if, in such situations, he carries his arms openly at the following times:
- during each military engagement, and
  - during such time as he is visible to the enemy while he is engaged in a military deployment preceding the launching of an attack in which he is to participate
- 9.12 The reason for this exception is that it would otherwise be impossible to conduct any kind of military action, since the enemy would quickly identify combatants and thus neutralise them. The requirement to carry arms openly applies from the place where the advance towards the objective of the operation begins. However, the requirement only applies for the period during which the person is visible to the enemy. In this context, “visible” means not only visible to the naked eye, but also visible to the enemy through the use of technical aids such as scopes, night-vision equipment, infrared devices and similar means. The point is that the enemy must be able to distinguish between an unarmed civilian and a combatant who is not wearing uniform but is carrying arms.

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<sup>4</sup> *The Land War Regulations, Articles 25 and 26; Additional Protocol I, Articles 59(1) and 85(3)(d).*

<sup>5</sup> *Additional Protocol I, Article 52(2).*

<sup>6</sup> *Additional Protocol I, Article 44(3).*

## ***War booty***

- 9.13 Military forces have the right to seize and potentially destroy enemy military property, material and equipment, i.e. to take war booty.<sup>7</sup> This applies not only to typical military equipment such as weapons, vehicles and vessels, but also military installations such as buildings and fortifications. It also applies to medical materials like ambulances and field hospitals, subject to the condition that sick and injured enemy soldiers, and civilians, must be provided with necessary care.<sup>8</sup>
- 9.14 As regards prisoners of war and other detained persons, detailed regulations specify what may be seized and what may be kept by a prisoner. See sections 6.34–39.
- 9.15 Detailed guidance on what should be seized and what should be done with seized objects will be provided by operational headquarters. In a combat situation, soldiers are permitted to use weapons taken from the enemy on the battlefield. In other words, it is the decisions concerning the general use of seized enemy material which must be made at the operational level.
- 9.16 War booty shall not be taken for private purposes, for example as war trophies or for other reasons. This is pillage, and is prohibited (see section 9.40).
- 9.17 If it is decided that materials seized from enemy military forces, such as weapons, vehicles or vessels, are to be used, the enemy's markings of nationality, unit markings, etc. shall be removed. See also section 9.26–28 regarding the prohibition against the use of the enemy's uniforms.

## ***Psychological operations (PSYOPS)***

- 9.18 The term “PSYOPS” describes psychological activities that use communications methods and other means directed at persons to influence their views, attitudes and conduct for the purpose of achieving political and military objectives.

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<sup>7</sup> *Land War Regulations, Article 23(g).*

<sup>8</sup> *Geneva Convention I, Articles 33 and 35.*

- 9.19 PSYOPS are permitted, provided that they do not violate the rules on protected persons and objects under the law of armed conflict. Not permitted, among other things, are PSYOPS directed solely or partly at the civilian population that may cause injury or damage to civilians or civilian objects, as such PSYOPS would constitute an attack. Examples of lawful PSYOPS include television, radio and internet broadcasts urging of the enemy to surrender, and the dropping of leaflets for the same purpose. An example of unlawful PSYOPS is distributing information with the aim of misleading civilians to cause them injury.

### *No-fly zone*

- 9.20 See sections 11.13–19, on restricted areas, exclusion zones and no-fly zones.

### *Maritime exclusion zones*

- 9.21 See sections 10.45–50.

### *Blockade*

- 9.22 See sections 10.40–44 with respect to sea blockades, and sections 11.40–42 regarding aerial blockades.

## **Prohibited methods**

This section provides an overview of the prohibited methods of warfare considered most relevant to Norwegian forces. Accordingly, this overview is not exhaustive.

### *Perfidy*

- 9.23 For perfidy to exist under the law of armed conflict, a combatant must first gain an enemy's confidence by leading him to believe that he is entitled to protection, and then betray that confidence.<sup>9</sup> For such an act to constitute perfidy, the enemy's confidence must be betrayed with the intent of killing, injuring or capturing him.

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<sup>9</sup> *Additional Protocol I, Article 37.*

- 9.24 The following are examples of perfidy when performed with the objective of killing, injuring or capturing an enemy:
- simulating a desire to negotiate under a flag of truce (white flag)
  - simulating surrender
  - simulating *hors de combat* status due to wounds or sickness, for example by pretending to be wounded only to fire on persons coming to provide assistance
  - simulating civilian, non-combatant status, for example by pretending to be a civilian and wearing civilian clothing to take a position prior to attack, or using civilian or other protected vehicles, aircraft or vessels
  - setting booby-traps close to injured or dead persons, or close to children's toys or other harmless objects (see sections 8.45–50 regarding the relatively narrow possibilities for using a booby-traps)
  - using false markings on a military aircraft to indicate that it is a medical aircraft
  - attacking only after first transmitting emergency signals or giving the impression of being in need, for example by sending out crew members in lifeboats
- 9.25 It will thus be permitted, for example, to pretend to be wounded or *hors de combat* if there is no intention to kill, injure or capture the enemy.

### ***Misuse of emblems, flags and uniforms***

- 9.26 In addition to the prohibition against perfidy, the misuse of certain flags, emblems and uniforms is also prohibited, or their use is restricted. No intention to kill, injure or capture is required for such misuse to be prohibited. “Misuse” means use contrary to the use prescribed in the law of armed conflict.
- 9.27 The following forms of misuse are prohibited:
- Misuse of the red cross, red crescent or red crystal emblems, or of other protective emblems specified in the law of armed conflict, such as the protective emblem used to mark cultural monuments.<sup>10</sup>
  - The use of a neutral state's flag or military symbols, distinctive signs or uniforms. In the case of warships, special rules provide some opportunity for activities such as sailing under a false flag. See section 9.5 for an explanation of lawful ruses of war.

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<sup>10</sup> *Additional Protocol I, Article 38(1).*

- Misuse of a flag of truce (white) flag. Misuse of a flag of truce to simulate a desire to negotiate will amount to perfidy if the intention is to kill, injure or capture the enemy. However, the misuse of this flag is also prohibited if the intention is other than to negotiate, for example if ground forces use the flag to prevent an aerial attack, to gather information about enemy positions, etc.<sup>11</sup>
- Use of the emblem of the United Nations, unless authorised by the UN.<sup>12</sup>

9.28 It is prohibited to use the enemy's flag or military emblems, insignia or uniforms during an attack or when the intention is to shield, favour, protect or impede military operations. This means that the use of enemy uniforms, etc. will be permitted primarily for training purposes outside the combat zone and for a prisoner of war or internee who uses the enemy's uniform to escape from detention. For warships, special rules provide some opportunity for activities such as sailing under a false flag. See section 9.5 for an explanation of lawful ruses of war.

#### EXAMPLE 2: PERFDY THROUGH MISUSE OF EMBLEMS

A Norwegian soldier who is captured during an armed conflict will often attempt to escape and return to his own forces. To escape successfully, he may be required to camouflage himself, for example by wearing an enemy uniform or pretending to be sick in order to use the ambulance to escape. The question is whether such actions are permitted under the law of armed conflict.

Use of an enemy uniform to escape is not prohibited, since such use does not occur during an attack and is not intended to shield, favour, protect or impede military operations.

The use of an ambulance bearing a protective emblem for escape purposes will not constitute perfidy since the emblem is not misused to kill, injure or capture an enemy. It will, however, represent a prohibited misuse of the emblem, because this prohibition is absolute. Accordingly, the action could result in disciplinary proceedings and be punishable under Norwegian law, but will not be a war crime provided that the misuse does not result in death or injury.

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<sup>11</sup> *Additional Protocol I, Article 38(1).*

<sup>12</sup> *Additional Protocol I, Article 38(2).*



## *Reprisals*

- 9.29 See sections 14.71–73.

## *Indiscriminate attacks*

- 9.30 See sections 2.16–17.

## *Shielding of lawful targets using protected persons or objects*

- 9.31 Belligerent parties shall wherever feasible seek to remove civilians and civilian objects under their control from the vicinity of lawful military objectives<sup>13</sup> This obligation must be assessed by reference to the prohibition against deporting or forcibly removing civilians from occupied territory unless the aim is to safeguard their security or imperative military reasons make it necessary; see sections 9.38–39.
- 9.32 Belligerent parties shall wherever feasible avoid placing lawful military objectives within or near populated areas, hospitals, cultural monuments, religious sites, prisoner-of-war camps or other facilities entitled to special protection under the law of armed conflict.<sup>14</sup>
- 9.33 In many countries, permanent military objectives are located in populated areas, partly for historical reasons and partly for practical military reasons. Examples in this regard may include defence ministries, soldier barracks, military academies, etc. This is also the case in Norway, where the Ministry of Defence, the Defence Staff and various other military units are located at Akershus Fortress in central Oslo. In such places the attacking party has an obligation to ensure that an attack is not expected to cause loss of civilian life or injury or damage to civilians or civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. In some cases, the solution for the attacking party may be to use precision-guided munitions. The defending party will have a duty to initiate evacuation of civilians from an area expected to be attacked or to be affected by such attacks,<sup>15</sup> or to relocate military activities away from the relevant areas.

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<sup>13</sup> *Additional Protocol I, Article 58(a).*

<sup>14</sup> *Additional Protocol I, Article 58(b).*

<sup>15</sup> *Additional Protocol I, Article 58(a).*

- 9.34 The presence or relocation of civilians shall not be exploited to attempt to influence the location of military operations. In particular, relocation shall not be used as a method to shield lawful targets against attack or to shield, advance or impede military operations.<sup>16</sup> A conceivable example would be that of a military unit guiding a stream of refugees along a particular route with the aim of protecting itself against attack by remaining close to the refugees.
- 9.35 When fighting occurs in built-up areas, it is likely that civilians will be present in, on, or in the vicinity of lawful targets. Although their presence will be difficult to avoid in practice, the defending party shall not exploit their presence to its advantage. On the contrary, wherever feasible the defending party must seek to keep its forces separate from the civilian population. Steps must also be taken to reduce the risk of civilians being present, for example by issuing warnings if circumstances permit.
- 9.36 Other relevant precautions shall also be taken to protect the civilian population, individual civilians and civilian objects against risks presented by military operations. Such precautions may include, for example, providing necessary emergency shelters or warning civilians of possible risks which may arise if the enemy attacks.
- 9.37 For a discussion of issues relating to persons who act as voluntary or involuntary civilian shields for military objects to protect these against attack, and the question of whether such persons are protected civilians or lawful targets, see example 3 in chapter 3.

### *Deportation and forcible transfers of the civilian population*

- 9.38 As a rule, the forcible transfer or deportation of the enemy's civilian population away from the area under a belligerent party's control is prohibited.<sup>17</sup> However, in certain cases forcible transfers of the civilian population may be justified on military grounds. To be permitted, such transfers must be necessary for imperative military reasons, for example the need to clear an area around a military camp to maintain the security of personnel in the camp.

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<sup>15</sup> *Additional Protocol I, Article 58(a).*

<sup>16</sup> *Additional Protocol I, Article 51(7).*

<sup>17</sup> *Geneva Convention IV, Article 49; Additional Protocol II, Article 17.*

- 9.39 Wherever possible, relocation must occur within the territory or, in relevant cases, the occupied area. Persons shall be returned to their homes as soon as hostilities in the area have ceased. The evacuation itself shall occur under suitable conditions, and account shall be taken of factors such as safety, cleanliness, hygiene and food supplies. Moreover, members of the same family shall not be separated. When such evacuations and transfers occur in an international armed conflict, the ICRC or a protecting power shall be informed as soon as possible after the event.<sup>18</sup> If possible, such notice shall also be given in non-international armed conflicts.

### *Pillage*

- 9.40 Pillage is prohibited.<sup>19</sup> Pillaging entails taking possession of or stealing property for private purposes. The prohibition applies to all enemy civilian property and effects, whether public or private. However, in the context of maritime warfare and air operations it is permitted in certain instances to seize (take as a prize) enemy civilian vessels and goods. See further discussion of this topic in section 10.74 onwards regarding maritime operations and section 11.57 regarding air operations. The right to seize and use the enemy's military property, material and equipment is discussed in sections 9.13–17, relating to war booty.

### *Starvation of the civilian population*

- 9.41 Starvation of the civilian population as a method of warfare is prohibited.<sup>20</sup> It is therefore prohibited to attack, destroy, remove or render useless objects that are indispensable to the survival of the civilian population. The prohibition does not apply to objects intended for use by the enemy's military forces. In other words, it is permitted to attempt to "starve out" the enemy, for example by siege (see sections 9.6–9). Where objects are also used by the civilian population and their destruction would lead to the starvation of the civilian population, the prohibition applies as described above.

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<sup>18</sup> *Geneva Convention IV, Article 49, second to fourth paragraphs.*

<sup>19</sup> *Land War Regulations Articles 28 and 47; Geneva Convention IV, Article 33; Additional Protocol II, Article 4(2)(g).*

<sup>20</sup> *Additional Protocol I, Article 54(1); Additional Protocol II, Article 14.*

### *Terror among the civilian population*

- 9.42 Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.<sup>21</sup> In an armed conflict, military actions may be regarded as terror by the civilian population because they cause fear and other inconvenience. However, such military actions will only be prohibited if causing terror among the civilian relation is the primary purpose of the actions. For example, repeated aerial attacks near or on cities may be regarded as terror by the civilian population because they cause fear and constant evacuation. However, such attacks will be permitted if they are conducted to destroy lawful targets and do not breach other rules of the law of armed conflict.

### *Hostage-taking*

- 9.43 Hostage-taking is prohibited.<sup>22</sup> Hostage-taking entails keeping one or more persons captive and threatening to kill, injure or continue to hold them captive with the aim of forcing a third party, generally the enemy, to do or refrain from doing something as a condition of the hostages' release. The prohibition applies irrespective of whether such hostages are civilians or military personnel.

### *Assassination*

- 9.44 Assassination is the killing, often secretly and through perfidious conduct, of persons who are not lawful targets, in many cases for political or religious reasons. Such killings are prohibited. Nor is it permitted to promise a reward for the killing of such persons. However, assassinations and attempted assassinations must not be confused with attacks directed at specific members of the enemy's armed forces, such as military commanders. As long as such persons are attacked due to their military function and status as lawful targets, the attack will not be an unlawful assassination or attempted assassination, even if it is directed at a named person.

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<sup>21</sup> *Additional Protocol I, Article 54(2); Additional Protocol II, Article 14.*

<sup>22</sup> *Geneva Conventions I–IV, common Article 3(1)(b); Geneva Convention IV, Article 34; Additional Protocol I, Article 75(2)(c); Additional Protocol II, Article 4(2)(c).*

### *Quarter and surrender*

- 9.45 It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.<sup>23</sup> Parties are obliged to grant quarter to the enemy when he clearly expresses an intent to surrender. Giving quarter means refraining from further attack.

For the rules relating to surrender, see sections 6.31–33. For special rules on surrender in air operations, see sections 11.43–45.

### *Espionage and gathering of information*

- 9.46 A spy is a person who covertly or under false pretences gathers or attempts to gather information in territory controlled by the enemy. The purpose of such information collection must be to pass the information on to the party on whose behalf the spy is acting. Espionage will normally involve gathering information on behalf of the spy's own military forces or an intelligence service, but may also entail intelligence collection on behalf of civilian authorities.
- 9.47 The use of "false pretences" involves portraying oneself as something other than what one is. This may include pretending to be a journalist, relief worker, etc. From this it follows that soldiers who gather information behind enemy lines cannot be convicted of espionage provided that they wear the uniform of their own forces. Personnel involved in reconnaissance and intelligence collection behind enemy lines are entitled to prisoner-of-war status even if they hide themselves by means of camouflage, provided that they wear the uniform of their own forces.

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<sup>23</sup> *Land War Regulations, Article 23(d); Additional Protocol I, Article 40; Additional Protocol II, Article 4(1).*



*Information-gathering in uniform (one's own) is not espionage. This picture is taken by a student at the Officer Training School for the Norwegian Home Guard during a field exercise outside Porsangermoen in 2010. Photo: Torgeir Hangaard/Norwegian Armed Forces Media Centre.*

- 9.48 Espionage does not violate of the law of armed conflict, but a spy is not entitled to the protection afforded by the law of armed conflict. A person captured by the enemy whilst engaged in espionage is therefore not entitled to prisoner-of-war status, but is to be treated as a spy.<sup>24</sup> Unlike lawful combatants, such persons are not exempt from criminal prosecution for lawful acts of war. Espionage is a criminal offence under the domestic legislation of most states, and persons convicted of such activities are normally subject to very strict penalties. Like any other person in enemy hands, persons accused of espionage are nevertheless entitled to humane treatment and a fair trial.<sup>25</sup>
- 9.49 A member of the armed forces of a party to the conflict who is a resident of territory occupied by the enemy and who, on behalf of the party with which he depends, gathers or attempts to gather information of military value within that territory shall not be considered as engaging in espionage unless he does through an act of false pretences or deliberately in a clandestine manner, for example by pretending to be a journalist, relief worker, etc. In such cases, there

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<sup>24</sup> *Additional Protocol I, Article 46.*

<sup>25</sup> *Additional Protocol I, Article 75.*

is no requirement for the person to wear a uniform.<sup>26</sup> Although this rule is of more recent origin, such activity can be exemplified by activities during the German occupation of Norway in World War II. Under the present rules, members of organised resistance movements such as Milorg could lawfully gather and pass on information of military value about the German occupying power whilst wearing civilian clothing, providing they did not do so covertly or under false pretences. In such cases, they should not be regarded as being engaged in espionage, and should therefore be given prisoner-of-war status if captured.

## Cyber operations

- 9.50 Cyber operations linked to an armed conflict are a relatively new topic. There is international agreement that the law of armed conflict also applies to cyber operations, although its application in practice may pose certain challenges. Accordingly, somewhat greater consideration is given to cyber operations in this manual than to other methods of warfare.

### *In general*

- 9.51 The field of cyber operations has developed considerably in recent years, in both the military and civilian spheres. More than in any other area, we see civilian and military organisations using the same systems and common infrastructure, with the risk that entails of civilian repercussions from cyber operations. The law of armed conflict was largely developed without cyber operations in mind. However, the law of armed conflict does take into account that both methods and means may evolve differently than anticipated at the time the rules were drafted. The general rules of the law of armed conflict therefore also apply to cyber operations.
- 9.52 Continuous, rapid development of the legal framework governing cyber operations in armed conflict is to be expected in the years ahead. This must be taken into account when using this manual.

### *Cyberattacks*

- 9.53 The rules of the law of armed conflict govern attacks and the use of force with respect to who or what may be attacked, how attacks should be conducted and the duty to protect civilians against the effects of attacks. Cyberattacks are subject to the same restrictions and regulations as other types of attacks.

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<sup>26</sup> *Additional Protocol I, Article 46(3).*

- 9.54 Under the law of armed conflict, attacks are defined as acts of violence against the enemy, whether offensive or defensive.<sup>27</sup> The term “violence” shall not be interpreted literally, so as to cover only acts which themselves involve the use of physical force. Acts with indirect violent consequences are also covered. In particular, acts which have the consequence that persons are injured or killed or that objects are damaged or destroyed are regarded as attacks. For example, the destruction or manipulation of a computer program resulting in a dam being opened and thus the drowning of persons, will be a cyberattack. “Cyberattack” means a cyber operation expected to cause death or injury to personnel or damage to or destruction of an object. See section 2.2 for the general definition of attack.
- 9.55 Cyberattacks will normally involve creating, interrupting, blocking, disrupting or destroying information stored on computers and computer networks, or the computer networks themselves, or taking control of a computer or computer network.
- 9.56 Cyber operations which do not rise to the level of being defined as a cyberattack may include defensive measures that do not cause injury or damage to personnel or objects; cyber espionage and reconnaissance; and the distribution of information.
- 9.57 A cyber operation directed towards civilians or civilian objects or other protected persons or objects will only be prohibited under the law of armed conflict if it qualifies as an attack.
- 9.58 In the context of target selection, data shall be regarded as objects and may only be attacked directly if they qualify as a lawful target (see section 7.2 onwards). In practice, a cyber operation will often delete or alter data in the targeted system. This applies particularly to offensive cyber operations, even though data may be neither deleted nor amended, for example in the case of a denial-of-service attack. “Denial-of-service” attack refers to an attack seeking to prevent something or someone (for example a person or system), from accessing information or network resources to which they would normally have access. Whether damaging or destroying data in itself will constitute a cyberattack must be assessed on the basis of the expected consequences of the operation. Attacks against military data will always be permitted because military objects are lawful targets. However, operations targeting civilian data which have violent consequences in the sense of some degree of destruction, damage, neutralisation, capture or similar effect comparable to a kinetic attack

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<sup>27</sup> *Additional Protocol I, Article 49(1).*



are prohibited. Avoidable but incidental deletion or modification of civilian data in connection with a cyberattack directed at a different target must be included in a proportionality assessment of the attack. The potential temporary or short-lived aspect of the damage caused must also be included in this assessment.

- 9.59 As elsewhere under the law of armed conflict, a distinction must be made between the actual target of an attack and its indirect effects. For example, damage to or destruction of civilian data in connection with an attack against military cyber infrastructure will be equivalent to causing incidental damage, injury or loss by kinetic means.



*Students from the Norwegian Defence School of Engineering engaged in cyberdefence training during a field exercise on Spåtind mountain in 2012. Photo: Torgeir Haugaard/Norwegian Armed Forces Media Centre.*

### ***Distinction during cyberattacks***

- 9.60 The principle of distinction also applies in the case of cyberattacks. The principle prescribes that cyberattacks are permitted only against members of the enemy's armed forces, organised armed groups, civilians participating directly in hostilities and objects which are lawful targets.

9.61 The prohibition against indiscriminate attacks also applies to cyber operations (see sections 7.16–17 on the general prohibition against indiscriminate attacks). An “indiscriminate attack” is one not directed at a specific lawful target, or one employing a method or means of warfare whose effects cannot be restricted as required by the law of armed conflict. In the case of cyberattacks, this requirement presents a challenge and is an important factor in the legal assessment prior to and during a cyberattack (see section 2.2 onwards, on precautions during attack).

9.62 Even where a cyberattack is directed at a lawful target, it may in some cases have a series of unpredictable effects on civilian cyber infrastructure. An obvious example is releasing malware that infects the computer systems of an enemy. Although the malware may be introduced only to the military network of the enemy, it may spread into civilian systems and from there even to neutral or allied states. This problem arises because civilian and military computer networks are often to some extent linked. If there is reason to believe that such malware may spread to civilian systems and cause civilian injury or death, or damage to or destruction of civilian objects, this effect must be included in a proportionality assessment during the planning of the attack. However, the problem caused by the spread of malware is that it may in practice be impossible to predict the likely consequence of any spread into civilian systems. In some cases, therefore, malware may be deemed indiscriminate means of warfare because it cannot be directed at or restricted to specific lawful targets. Cyberattacks using means capable of spreading outside the attacker’s control are not permitted.

9.63 The above considerations apply not only to offensive operations, but also to defensive operations such as automatic response. In purely technical terms, “automatic response” describes the ability of equipment to discover undesirable events and then to block the activity it has discovered. Normally, the equipment either establishes a firewall protocol, for example to block the IP address from which the undesired activity originates, or employs lawful network protocol functions (sending a reset message to the sender). In other words, automatic response does not constitute an automated counter-attack. In practice, very few parties employ automatic response because the detection mechanisms have an excessively high false positive detection rate. This means that false alarms are commonplace, and that if automated responses are implemented they may cause equipment to block non-malicious data traffic. Nevertheless, countermeasures should be considered as a part of defensive operations. For example, the Norwegian Armed Forces may suffer a massive denial-of-service attack, i.e. an attack seeking to prevent something or someone (for example a person or system) from accessing information or network resources to which they should have access. In peacetime it is normal

for such cases to be reported to the police and to contact the authorities of the country in which the command and control servers supporting the denial-of-service attack are located, so they can be disabled. It is uncertain whether this will be a realistic option in the case of an armed attack or armed conflict, and in such cases a counter-attack against the command and control servers may be a way of stopping the attack against the Norwegian Armed Forces. However, such counter-attacks must be planned and conducted within the framework of the rules governing target selection and precautions, not through technological automation. Rules of engagement may regulate rapid response options.

### *What may be lawfully attacked?*

- 9.64 Attacks shall be limited to lawful targets. In so far as objects are concerned, lawful targets are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action. In addition, the total or partial destruction, capture or neutralisation of such an object must offer a definite military advantage in the circumstances ruling at the time.<sup>28</sup>
- 9.65 The general rules governing what may lawfully be attacked are the same irrespective of whether kinetic means are used, like bombs and grenades, or the attack is a cyberattack.

#### EXAMPLE 3: ADVANTAGES OF CYBERATTACKS

A power station is considered to constitute a lawful target. Based on the available military resources, there are two possible methods of neutralising the power station. One is to send fighters to bomb the station itself. The other is to disable vital functions by destroying the computer program used to operate the power station, i.e. by means of a cyberattack. In principle, both methods are permitted. Due to the location of the power station in a civilian area and the presence of civilian employees, bombing is highly likely to entail civilian losses which are disproportionate to the military advantage which is anticipated to be gained by disabling the power station. Such an attack will therefore not be permitted. Accordingly, a cyberattack will be the only lawful method for neutralising the power station.

- 9.66 The option of directing cyberattacks against targets located far behind the front line also raises the specific issue of the distinction between war-supporting capabilities (lawful) and objects which only support the general war

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<sup>28</sup> *Additional Protocol I, Article 52(2).*

effort (not lawful targets). See section 7.13–15 for the rules governing this distinction.

### *Geographical and territorial limitations*

- 9.67 Cyber operations are subject to the same geographical and territorial limitations as kinetic attacks under the law of armed conflict. This means that cyberattacks may only be conducted from and against the territory of the belligerent parties, in international waters and airspace and, subject to certain restrictions, in outer space. Cyber operations present particular challenges with respect to neutral territories. Neither cyberattacks nor other attacks against or from neutral territories are permitted. The challenge is that a cyberattack can be conducted from anywhere in the world, and that digital signals will often pass through several states. In this context, neutral states are all states not party to an armed conflict.
- 9.68 It is permissible to use public, international and openly available networks, such as the internet, in cyber operations directed at the enemy. This applies even if parts of such a network are located in the territory of a neutral state. This also applies to cyber operations constituting an attack. If such use of a network in a neutral state makes it likely that the enemy will regard the attack as coming from a neutral state, however, it will not be permitted. To maintain its neutrality, the neutral state must act impartially and thus may not facilitate attacks by only one of the parties to the conflict through networks located in its territory or under its exclusive control.

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## Maritime operations

### Introduction

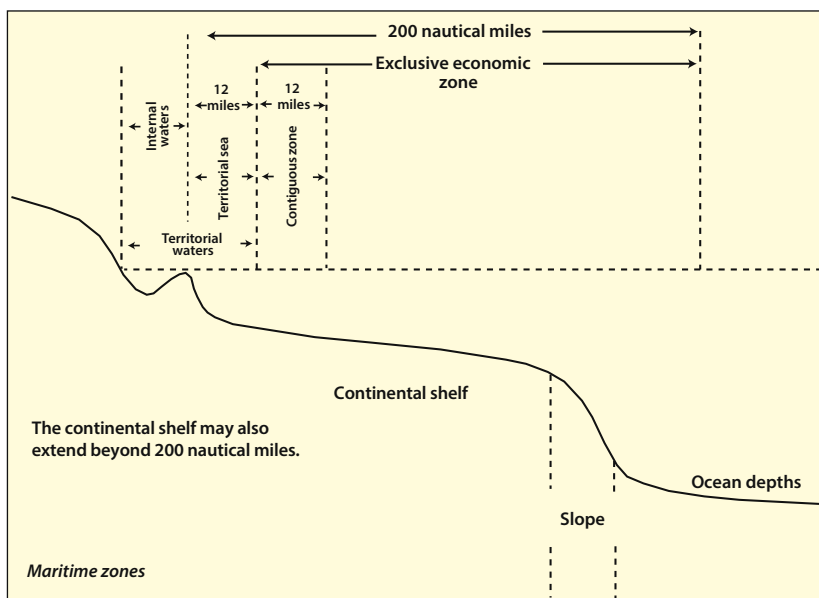
- 10.1 This chapter discusses rules specially applicable to maritime operations during armed conflict, and must be read in conjunction with the rest of the manual. The rules in this chapter apply in large part regardless of where maritime operations occur, as long as it is outside the territorial seas of neutral states. Norwegian forces shall ensure that operations have the smallest possible impact on civilian merchant vessels, whether these belong to the enemy or are neutral, unless the mission is to enforce a blockade or similar measure directly focused on civilian ship traffic. On the high seas, all parties are required to show due regard for others using the freedom of the high seas. Restrictions concerning the area of operations and measures affecting civilian ship traffic must be described in detail in the rules of engagement for the specific operation.



*Different types of Norwegian war ships: A CB 90 boat in front of the frigate HNoMS Roald Amundsen during the Cold Response winter exercise in 2012. Photo: Torbjørn Kjosvold/Norwegian Armed Forces Media Centre.*

## Definitions

- 10.2 This section describes a number of special terms and expressions used in the rest of the chapter.
- 10.3 *Baselines.* Baselines are straight lines drawn between points on outer headlands and skerries protruding above the water at low tide. A straight line means the shortest line between two points.<sup>1</sup>
- 10.4 *Internal waters.* Internal waters are waters within a state's baselines.<sup>2</sup>
- 10.5 *Territorial sea.* The territorial sea encompasses the sea area from the baseline out to a point 12 nautical miles from the nearest baseline point.<sup>3</sup>



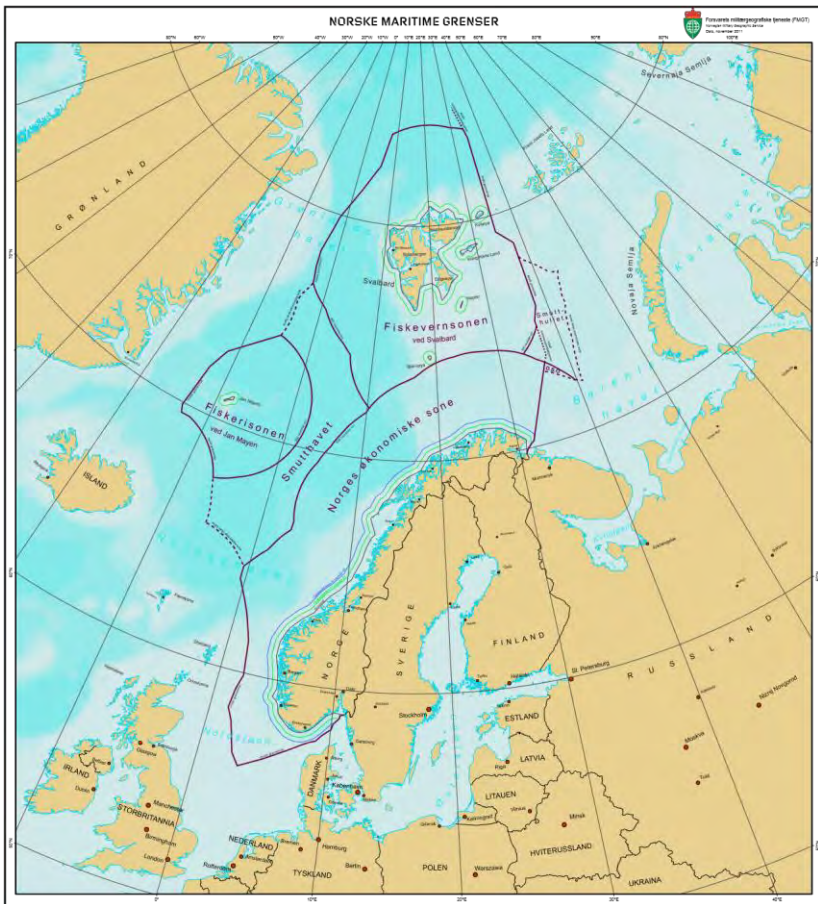
- 10.6 *Territorial waters.* Territorial waters comprise the territorial sea and the internal waters.<sup>4</sup>

<sup>1</sup> Regulations relating to the baselines for the territorial sea around Mainland Norway of 14 June 2002; Regulations relating to the baselines for the territorial sea around Svalbard of 1 June 2001; Regulations relating to the baseline for the territorial sea around Bouvet Island of 25 February 2005.

<sup>2</sup> Act relating to Norway's territorial waters and contiguous zone (the Territorial Waters Act) of 27 June 2003 No. 57, section 3; UN Convention on the Law of the Sea (UNCLOS) of 10 December 1982, part II.

<sup>3</sup> Territorial Waters Act, section 2; see also UNCLOS, part II.

<sup>4</sup> Territorial Waters Act, section 1; UNCLOS, part II.



Norway's maritime boundaries. Source: Norwegian Military Geographic Service.

- 10.7 *Contiguous zone.* The contiguous zone is adjacent to the territorial sea and has an outer boundary 24 nautical miles distant from the nearest point of the baseline.<sup>5</sup>
- 10.8 *Exclusive economic zone, 200 nautical mile zones.* Coastal states are entitled to establish 200 nautical mile maritime zones lying outside, but adjacent to, their territorial sea. Such zones are measured from the baselines. Norway has established an exclusive economic zone around the Norwegian mainland, a fishery protection zone around Svalbard and a fishery zone around Jan Mayen

<sup>5</sup> *Territorial Waters Act, section 4, UNCLOS, part II.*

island.<sup>6</sup> These zones do not form part of the territory which is subject to the coastal state's sovereignty, but the coastal state has sovereign rights to the natural resources both on the seabed and in the sea areas. Accordingly, the coastal state has the sovereign right to exploit, preserve and manage resources such as oil, gas and fisheries. In connection with maritime operations in armed conflict, the exclusive economic zone may for all practical purposes be regarded as the high seas, subject to the restrictions stemming from the coastal state's sovereign rights in the zone.

- 10.9 *Archipelagic states and archipelagic waters.* Archipelagic states are states comprising groups of islands which may under certain conditions expand their sovereignty to include sea areas lying between the islands, i.e. waters lying within the archipelagic baselines drawn between the outer points of the islands. Indonesia is an example of an archipelagic state. Archipelagic sea lanes are specially designated sea lanes throughout the waters of archipelagic states.<sup>7</sup>
- 10.10 *The high seas.* The high seas comprise all sea areas not encompassed by the exclusive economic zone, territorial sea or internal waters of a state or the archipelagic waters of an archipelagic state.<sup>8</sup>
- 10.11 *Neutral waters.* Neutral waters consist of the territorial waters and any archipelagic waters of a neutral state.<sup>9</sup> Neutral states are states which are not party to a given armed conflict.
- 10.12 *Transit passage.* "Transit passage" refers to navigation exclusively for the purpose of continuous and expeditious transit through an international strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.<sup>10</sup> During transit passage, vessels must refrain from any threat or use of force against the sovereignty and territorial integrity of the states bordering the strait. They must also refrain from any activities other than those incidental to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or distress at sea or the provision of assistance to persons, ships or aircraft in

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<sup>6</sup> Act relating to the economic zone of Norway (Economic Zone Act), section 1; Regulations of 17 December 1976 relating to the establishment of the economic zone of Norway; Regulations of 3 June 1977 relating to a fishery protection zone around Svalbard; Regulations of 23 May 1980 relating to the establishment of a fishery zone around Jan Mayen, UNCLOS, part V.

<sup>7</sup> UNCLOS, part IV.

<sup>8</sup> UNCLOS, Article 86.

<sup>9</sup> UNCLOS, Article 2(1); San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1995) (SRM), Article 14.

<sup>10</sup> UNCLOS, Article 38.



danger or distress.<sup>11</sup> “*Force majeure*” refers to extraordinary or unforeseen events outside the control of the vessel, for example that a ship becomes unseaworthy due to an event that was impossible to predict.



*HNoMS Uthaug at the surface. Photo: Torgeir Haugeard/Norwegian Armed Forces Media Centre.*

- 10.13 *Innocent passage.* “Innocent passage” means passage through the territorial sea either for transit purposes or en route to or from the internal waters or ports of a state. Such passage must be continuous and expeditious. Stopping or anchoring in the territorial sea during passage is permitted only if incidental to normal sailing or made necessary by *force majeure* or distress at sea. The same is permitted to provide assistance to persons, ships or aircraft in danger or distress. Passage will be innocent as long as it is not to the detriment of the coastal state’s peace, good order or security. In principle, the right of innocent passage also applies to warships, though some states including Sweden require prior notification when warships intend to exercise this right. Warships sailing in the territorial waters of another state are not permitted to launch or recover aircraft. All exercises and practice with weapons of any kind are also prohibited, unless the coastal state has granted its permission.<sup>12</sup> Submarines intending to utilise this right must navigate on the surface and show their

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<sup>11</sup> UNCLOS, Article 39

<sup>12</sup> UNCLOS, Articles 18 and 19.

flag.<sup>13</sup> During armed conflict, this right will only be relevant to warships sailing in neutral waters.

- 10.14 *Visit*. “Visit” means boarding and checks of ownership, crew, cargo and destination based on a vessel’s papers.
- 10.15 *Search*. “Search” means physical checks of a vessel, crew and cargo.
- 10.16 *Capture*. “Capture” means ordering a vessel to sail to a particular port, normally for the purposes of a search, seizure, etc. Capture will normally be implemented by taking command of the ship and sending a prize crew aboard.
- 10.17 *Prize*. A prize is a vessel which has been taken control over by capture.
- 10.18 *Contraband*. Contraband is cargo aboard a neutral merchant ship en route to territory under the control of the enemy, which is suited for use in the ongoing armed conflict. Typical examples of contraband include weapons and other military equipment. The belligerent parties must have announced a list of goods considered to be contraband in advance. The list must be specific and may not include religious objects, medical equipment, food and other important supplies for the civilian population, objects intended for prisoners of war or other objects which by agreement are exempt from capture.<sup>14</sup> However, if it is highly probable that such supplies will benefit armed forces directly or indirectly, they may be stopped. In such cases, consideration should be given to whether purely medical supplies should be permitted to pass on humanitarian grounds.
- 10.19 *Warship*. A warship is a vessel belonging to the armed forces of a state and bearing the relevant state’s distinctive external markings for warships. In the case of Norwegian vessels, these requirements will be met if a vessel has a vessel number and flies the Norwegian naval ensign. A further requirement is that a vessel must be under the command of an officer and have a crew subject to ordinary military discipline.<sup>15</sup> Warships need not be armed. If civilian vessels are converted into warships, they will also fall into this category.<sup>16</sup> The term “naval vessel” is often used for warships. A warship must be distinguished from other state-owned or state-operated vessels. Only warships may lawfully conduct military attacks and other acts of war, for example enforcing

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<sup>13</sup> UNCLOS, Article 20.

<sup>14</sup> Geneva Convention II, Article 38; Geneva Convention IV, Article 23; SRM, Articles 147–150.

<sup>15</sup> UNCLOS, Article 29.

<sup>16</sup> Procedures are described in the Convention relating to the Conversion of Merchant Ships into War-Ships of 18 October 1907.

blockades and conducting visits, searches and captures. If other vessels are to be used, they must be converted into warships through registration and marking.

- 10.20 *State vessels.* State vessels are vessels owned or operated by a state and which are used only for non-commercial state activity, such as customs and police work.
- 10.21 *Merchant vessel.* Merchant vessels are all vessels which are not warships and which are used exclusively for commercial or fisheries purposes, or passenger transport in exchange for payment, or private vessels of a non-commercial nature, such as pleasure boats. If a merchant vessel is armed, this will not alter its status as a merchant vessel, unless the vessel constitutes a lawful target (see section 7.2 onwards). Enemy merchant vessels are vessels belonging to, registered in or sailing under the flag of the enemy. Neutral merchant vessels are vessels belonging to, registered in or sailing under the flag of a neutral state.
- 10.22 *Auxiliary vessel.* Auxiliary vessels are vessels with civilian crews which are owned or operated by a state and which perform support functions for a state's maritime forces without being warships.

## Neutrality and neutral waters

- 10.23 The right of innocent passage through the territorial sea and archipelagic sea lanes of other states continues to apply in the event of armed conflict. The right may be temporarily suspended if suspension is essential to the protection of the security of a coastal state or archipelagic state.<sup>17</sup> The right of transit passage through neutral international straits also continues to apply during armed conflict. The right of transit passage through international straits cannot be suspended.<sup>18</sup>
- 10.24 The right of passage through the territorial sea of another state is conditional upon such passage being innocent; see section 10.13. Accordingly, belligerent parties are prohibited from engaging in hostile actions in neutral waters.<sup>19</sup> It is also prohibited to use neutral waters as a place of sanctuary.<sup>20</sup> The conditions of passage through international straits and archipelagic sea lanes are discussed in sections 10.29–31 below.

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<sup>17</sup> UNCLOS, Articles 25(3) and 52(2).

<sup>18</sup> UNCLOS, Article 44, SRM, Articles 23 and 28.

<sup>19</sup> Convention concerning the Rights and Duties of Neutral Powers in Naval War (Hague XIII), The Hague, 18 October 1907, Articles 1 and 2, SRM, Article 15.

<sup>20</sup> SRM, Article 17.

10.25 “Hostile actions” is a wider term than “acts of war”, and in this context means, for example:<sup>21</sup>

- attack on or capture of persons or objects located in or on neutral waters
- laying of mines
- visit, search, diversion or capture
- use of neutral waters as a base for military actions, including attacks on or capture of persons and attacks on or seizure of objects located outside neutral waters
- reporting the movements of combatants to one of the parties to a conflict

10.26 Neutral states are permitted to restrict belligerent parties’ right of passage. They may set conditions for, restrict or prohibit entrance to or passage through their neutral sea areas. The provision may also be applied to civilian vessels where this is considered necessary on security grounds. Such measures shall be implemented in a non-discriminatory manner, i.e. without distinction between the vessels of different belligerent states.<sup>22</sup>

10.27 A neutral state may permit the following activities in its neutral waters without jeopardizing its neutrality:<sup>23</sup>

- innocent passage through its territorial waters or archipelagic waters of warships belonging to belligerent parties, accompanied if relevant by a pilot from the neutral state<sup>24</sup>
- resupply of warships with food, water and fuel sufficient to allow them to reach a port in their own territory<sup>25</sup>
- repair of warships found necessary by the neutral state to make them seaworthy, such repairs not to restore or increase to the fighting strength of a vessel<sup>26</sup>

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<sup>21</sup> SRM, Article 16.

<sup>22</sup> UNCLOS, Article 25; Hague XIII, Article 9; SRM, Article 19.

<sup>23</sup> SRM, Articles 20 and 21

<sup>24</sup> Hague XIII, Article 10

<sup>25</sup> Hague XIII, Article 19.

<sup>26</sup> Hague XIII, Article 17.

#### EXAMPLE 1: THE ALTMARK INCIDENT – VIOLATION OF NORWEGIAN NEUTRALITY IN WORLD WAR II

The Altmark was a German tanker and supply ship which operated, among other things, as a prison ship for the German armoured cruiser Admiral Graf Spee. On 16 February 1940, the Altmark, with 300 British prisoners aboard, was forced into the Jøssingfjord and boarded by British naval forces. At this point, Norway was neutral.

The background to the incident was that on 14 February 1940 the Altmark had managed to reach the Norwegian coast of Trondheim without being observed by the British. The Altmark sailed under its correct name and flew the flag of the German Reich. The Altmark was met by a Norwegian torpedo boat off Kristiansund. A Norwegian sub-lieutenant boarded the ship but did not inspect it below decks. Further cursory visits were conducted at Ålesund and Sognesjøen. During all three visits, the German captain did not reveal that English prisoners were on board. When the intelligence officer of the maritime district received information indicating the suspected role of the Altmark, the ship was stopped again, this time off Bergen. A request was then made to inspect all rooms on the ship. This was refused by reference to the fact that the Altmark was a German state ship. The matter was dealt with at the highest level, where it was incorrectly assumed that the ship had been searched. It was therefore decided that the ship should continue along the coast with a Norwegian escort.

The British clearly had better information regarding the prisoner transport, and the episode culminated in the British destroyer Cossack defying the Norwegian escort, entering Norwegian territorial waters and freeing the prisoners in the Jøssingfjord. The British claimed that Norway, by allowing the prisoner transport to sail through its waters, had demonstrated a lack of ability to maintain its neutrality.

Both Germany's transportation of prisoners through the Norwegian territorial sea and the United Kingdom's actions against the Altmark are examples of violations of neutrality. Both incidents are regarded as hostile actions. Even so, the British were entitled to conduct the action to free their own forces, especially if they assumed that Norway knew of the prisoners but had allowed the Altmark to sail through Norwegian neutral waters anyway. Norway demonstrated an inadequate ability (and possibly an unwillingness) to enforce its neutrality. When a neutral state lacks the ability and/or willingness to enforce its neutrality, a right of self-defence arises which the British in this case used as a basis for taking action against the Altmark.

The incident put neutral Norway in a diplomatic squeeze between the belligerent states of Germany and the United Kingdom, and has often been cited as a contributory factor in Germany's decision to invade Norway in April 1940.

- 10.28 If a belligerent party violates the rules governing the use of neutral waters, the neutral state is under an obligation to take the measures necessary to terminate the violation. If the neutral state fails to terminate the violation, the opposing party, i.e. the other belligerent party, may notify the neutral state that it will take measures if the violation is not terminated. If a violation in neutral waters constitutes a serious and immediate threat to the security of the opposing party, that party may, in the absence of any feasible and timely alternative, use such force as is necessary and proportionate to respond to the threat.<sup>27</sup> If the threat is severe, it may lead, as a last resort, to the sinking of the ship. Before any such sinking, the enemy ship should be alerted to give it an opportunity to depart. A duty will exist to help all shipwrecked persons, even if they become shipwrecked due to the sinking in question.

## International straits and archipelagic sea lanes

- 10.29 In addition to the rules on innocent passage through the territorial sea of other states, there are separate rules governing passage through international straits and archipelagic sea lanes or waters. Warships belonging to the belligerent parties have the same right of transit passage and passage through such areas as civilian ships and neutral warships.<sup>28</sup> The warships of neutral states have a right of passage through international straits and archipelagic sea lanes even if these border on the belligerent states. In such cases, the neutral state should notify the relevant belligerent state of the planned passage.<sup>29</sup>
- 10.30 Neutral states shall not suspend, hamper or otherwise impede the right of transit passage or the right of passage through archipelagic sea lanes or international straits.<sup>30</sup> States that border on or have international straits in their territorial seas have a duty to permit innocent passage and transit passage, including of warships belonging to belligerent parties. The neutrality of the state bordering on an international strait is not violated by transit passage or innocent passage by warships belonging to belligerent parties.<sup>31</sup> Likewise, the neutrality of an archipelagic state will not be violated by the passage of warships belonging to belligerent parties.<sup>32</sup>

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<sup>27</sup> SRM, Article 22.

<sup>28</sup> UNCLOS, Articles 38 and 53; SRM, Articles 23 and 28.

<sup>29</sup> SRM, Article 26.

<sup>30</sup> UNCLOS, Article 42(2); SRM, Articles 29 and 33.

<sup>31</sup> Hague XIII, Article 10; SRM, Article 24.

<sup>32</sup> Hague XIII, Article 10; SRM, Article 25.

including of warships belonging to belligerent parties. The neutrality of the state bordering on an international strait is not violated by transit passage or innocent passage by warships belonging to belligerent parties.<sup>31</sup> Likewise, the neutrality of an archipelagic state will not be violated by the passage of warships belonging to belligerent parties.<sup>32</sup>

- 10.31 In order for passage through international straits and archipelagic sea lanes or waters to be permitted, such passage must be proceed without delay. In addition, there may be no threat or use of force against the sovereignty, territorial integrity or political independence of any neutral state bordering the strait, or any other hostile action.<sup>33</sup> Despite these restrictions, defensive measures are permitted if necessary on security grounds. Such measures may include allowing launching and recovery of aircraft and the use of acoustic and electronic surveillance. However, this exception does not permit offensive operations to be carried out against enemy forces; nor does it permit the use of neutral waters as a place of sanctuary or base of operations.<sup>34</sup> The right of self-defence, however, continues to apply in such cases.

## Target selection in maritime operations

- 10.32 When engaged in hostilities at sea, warships are bound by the general principles of the law of armed conflict concerning distinction, proportionality, military necessity and humanity. In addition, the rules presented in other chapters of this manual also apply to maritime operations, in particular the rules on the conduct of attacks (chapter 2), means of warfare (chapter 8), who and what constitute lawful targets (chapters 3 and 7), and protected persons and objects (chapters 4 and 7).
- 10.33 All use of force must be militarily necessary. In addition, attacks must be directed at lawful targets, and all feasible precautions shall be taken to avoid or reduce incidental injury or damage to civilians and civilian objects. Even though the rules are the same, their application may present different challenges in maritime operations than, for example, land operations.

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<sup>33</sup> UNCLOS, Article 39; SRM, Article 30.

<sup>34</sup> Hague XIII, Articles 1, 2 and 5; SRM, Article 30.



*HNoMS Glimt firing a Norwegian anti-ship missile. Photos: Royal Norwegian Navy/Kongsberg/Norwegian Armed Forces Media Centre.*

### ***Attacks on enemy warships***

- 10.34 Enemy warships are lawful military targets, and may be attacked. Exceptions include hospital ships (see section 10.38 below). Enemy warships may be attacked when discovered, without warning and without giving consideration to the safety of the crew on board the enemy warship.

### ***Criteria governing attacks on enemy merchant vessels***

- 10.35 Merchant vessels sailing under the flag of an enemy state are in principle civilian, and thus not lawful military targets. However, this protection is conditional on the merchant vessel not being used for activities linked to the hostilities. If civilian merchant vessels qualify as military objectives as described in section 7.2 onwards, they also lose their protected civilian status.<sup>35</sup> The following are examples of activities which may cause an enemy merchant vessel to lose its protection and become a lawful target:<sup>36</sup>
- Engaging in hostile actions on behalf of the enemy, e.g., laying mines, minesweeping, cutting undersea cables and pipelines, engaging in visit and search of vessels or attacking them.
  - Acting as an auxiliary to the enemy's armed forces, e.g. carrying troops or repairing and maintaining warships.
  - Being incorporated into or assisting the enemy's intelligence collection, e.g. engaging in reconnaissance, early warning, surveillance, or command, control and communications missions.
  - Sailing under convoy of enemy warships or military aircraft. The reason the merchant vessel must then be regarded as a lawful target is that by

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<sup>35</sup> SRM, Article 59.

<sup>36</sup> SRM, Article 60.



sailing under the protection of enemy warships it has clearly indicated an intention actively to resist visit, search or capture.<sup>37</sup>

- Refusing an order to stop or actively resisting visit, search or capture. The reason the merchant vessel must then be regarded as a lawful target is that it is impossible to check whether it is carrying contraband, participating in hostilities, etc.
- Being armed to an extent that it could inflict damage on a warship. Examples of such arms include anti-ship missiles. Light individual weapons for self-defence, e.g. against pirates, and purely defensive systems such as chaff and flares, will normally be permitted.
- Otherwise making an effective contribution to the enemy's military action.

### *Criteria governing attacks on neutral merchant vessels*

10.36 Merchant vessels sailing under the flag of a neutral state may only be attacked when:<sup>38</sup>

- A merchant vessel is believed on reasonable grounds to be carrying contraband or breaching a blockade, and after clear prior warning refuses to stop, or clearly resists visit, search or capture. The reason the merchant vessel must then be regarded as a lawful target is that it is impossible to check whether it is carrying contraband, participating in hostilities, etc.
- A merchant vessel engages in hostile actions on behalf of the enemy.
- A merchant vessel acts as an auxiliary vessel for the enemy's armed forces.
- A merchant vessel is incorporated into or assists the enemy's intelligence-gathering.
- A merchant vessel sails under convoy of enemy warships or military aircraft. The reason the merchant vessel must then be regarded as a lawful target is that by sailing under the protection of enemy warships it has clearly indicated an intention to actively resist visit, search or capture.
- A merchant vessel otherwise makes an effective contribution to the enemy's military action, e.g., by carrying military material, and it is not feasible for the attacking forces to place passengers and crew in a place of safety before the attack. In such cases, the vessel shall be warned of the consequences of its activities so that it can change course, offload or take other precautions.

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<sup>37</sup> *Procès-verbal relating to the Rules of Submarine Warfare of 6 November 1936 (the London Protocol), rule no. 2.*

<sup>38</sup> *SRM, Article 67; London Protocol, rule no. 2.*

10.37 The fact that a neutral merchant vessel is armed is not enough to define it as a military objective. The arming of merchant ships for self-defence against pirates and similar threats must be considered, among other factors, in making such a determination.

### *Enemy vessels exempt from attack*

10.38 The following classes of vessels belonging to the enemy may not be attacked, even if they are part of the armed forces:<sup>39</sup>

- hospital ships (see further discussion of these in sections 5.39–41)
- small craft used for coastal rescue operations to rescue personnel (not to salvage vessels) and other medical transportation (such vessels shall be painted white and marked with the red cross)
- vessels granted safe conduct by agreement between the belligerent parties including:
  - vessels engaged in humanitarian missions, e.g. vessels carrying supplies indispensable to the survival of the civilian population, and vessels engaged in relief actions and rescue operations
  - vessels transporting cultural property
- cartel vessels, e.g. vessels engaged in the transport of prisoners of war
- passenger vessels when engaged only in carrying civilian passengers
- vessels charged with religious, non-military scientific or philanthropic missions (vessels collecting data of likely military application are not protected)
- small coastal fishing vessels and small boats engaged in local coastal trade
- vessels constructed or used exclusively for responding to pollution incidents in the marine and coastal zone
- vessels which have surrendered
- lifeboats

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<sup>39</sup> SRM, Article 47.

10.39 The vessels listed in section 10.38 are exempt from attack provided that they satisfy the following criteria:

- they are employed in their normal role
- they submit to identification and inspection when required
- they do not intentionally hamper the movement of combatants
- they obey orders to stop or move out of the way when required
- they do not participate directly in hostilities

## Methods of warfare in maritime operations

This section reviews methods of warfare particular to maritime operations. The rules on general methods will also be applicable to this type of operation; see chapter 9. For the rules on means of warfare (weapons), see chapter 8.

### *Blockade*

10.40 Blockade is a method of warfare that involves blocking access to all or parts of the enemy's coast with the aim of preventing both the entry and exit of ships or aircraft, irrespective of affiliation. A blockade can be enforced using a combination of different military means and methods, including the use of both warships and aircraft.

10.41 The establishment of a blockade is subject to four conditions, all of which must be met in order for the blockade to be lawful under the law of armed conflict:

- The blockade must be declared and notified to all belligerent and neutral states. The declaration shall specify the commencement, duration, location, and extent of the blockade, and the period within which vessels of neutral states may leave the blockaded coastline.<sup>40</sup>
- The blockade must be effective. Whether a blockade is deemed effective is a matter of the facts on-site, including whether the blockading force is able to enforce the blockade by preventing the entry and exit of ships and aircraft.<sup>41</sup>
- The blockade must not bar access to the ports and coasts of neutral states.<sup>42</sup>
- The blockade must be applied impartially to the vessels of all states.<sup>43</sup>

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<sup>40</sup> SRM, Articles 93 and 94.

<sup>41</sup> SRM, Article 95.

<sup>42</sup> SRM, Article 99.

<sup>43</sup> SRM, Article 100.

10.42 The establishment of a blockade is prohibited if:

- It has the sole purpose of starving the civilian population or denying it other objects essential for its survival, such as medicine and food supplies; or
- The harm to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.<sup>44</sup> This evaluation of the blockade's proportionality must be undertaken by the operational headquarters leading the operation.

10.43 Merchant vessels which are suspected of breaching a blockade may be captured. Merchant vessels that, after being forewarned, clearly resist capture and breach a blockade may be attacked. This rule applies irrespective of whether a merchant vessel is sailing under an enemy or neutral flag.

10.44 If the civilian population of the blockaded territory is inadequately provided with objects such as food, medicines and clothing necessary for its survival, the party conducting the blockade must either provide such supplies itself or provide for free passage of such supplies. The blockading party shall in such cases be entitled to prescribe technical arrangements for those conducting the transport of supplies. Among other things, the blockading party may require the visit and search of transport vessels. A further possible condition is that the distribution of the supplies be supervised by a protecting power or an impartial humanitarian organisation such as the ICRC. The blockaded party may introduce comparable regulation of transport of medical supplies for use by wounded and sick members of the enemy's armed forces.<sup>45</sup>

### *Establishment of maritime exclusion zones*

10.45 A blockade must be distinguished from a maritime exclusion zone (MEZ).<sup>46</sup> Whereas a blockade is a type of imaginary line or "wall" in front of a port or coast which may not be crossed by way of entry or exit, an exclusion zone is a three-dimensional area or "box" to which ship traffic and all aircraft are refused access. This area could well be on the high seas, and does not need to be adjacent to a coastline. For more information on the use of exclusion zones relating to air traffic, see sections 11.16–17.

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<sup>44</sup> SRM, Article 102.

<sup>45</sup> SRM, Articles 103 and 104; Additional Protocol I, Articles 49(3), 54(1) and 70.

<sup>46</sup> SRM, Articles 105–108.

- 10.46 Maritime exclusion zones are often established to restrict the geographical area available for maritime operations, or to keep neutral vessels distant from sea areas in which combat activity is taking place. Maritime exclusion zones are lawful if established for the purpose of warning neutral vessels and aircraft to keep away from dangerous areas and thus to reduce the risk of exposure to the dangers inherent in acts of war. In addition, an exclusion zone must not have an unreasonable impact on lawful neutral ship traffic, for example by making it impossible in practice for neutral ships to reach a neutral port. A further condition is for the party that sets up the zone to be able to enforce it effectively.
- 10.47 The establishment of an exclusion zone does not exempt the party that establishes the zone from any of its obligations under the law of armed conflict, including the duty to refrain from attacking vessels or aircraft which are not lawful targets. This means that a vessel, whether a maritime vessel, aircraft or other vessel which is otherwise protected against attack, does not lose such protection simply because it crosses an imaginary line set by one of the parties to a conflict.
- 10.48 In other words, the law of armed conflict applies equally both within and outside such zones. These zones therefore cannot function as so-called “free-fire” zones for belligerent warships, where everything that enters the zone is attacked. This is particularly important with respect to targeting, in that the same requirement as to the certainty of an attack being directed at a lawful target applies both inside and outside the zone. The establishment of such a zone may, however, affect situational awareness in the area, provided that the zone is announced and can thus be assumed to be generally known to seafarers in the area. A vessel which moves into the zone and fails to respond to calls may be considered to have hostile intent. Nevertheless, the parties are obliged to take all feasible precautions to verify that a vessel is a lawful target. In the case of civilian vessels and aircraft, this will in practice entail determining whether they are participating directly in hostilities or otherwise satisfy the conditions to qualify as military objectives as described in sections 10.36– 37.
- 10.49 In connection with establishment and enforcement of a maritime exclusion zone, account shall be taken of the right of neutral states to use the sea area in question. In addition, neutral maritime vessels and aircraft shall be granted safe passage through the zone in the following cases:
- where the geographical extent of the zone significantly impedes free and safe access to the ports and coasts of a neutral state, or
  - in other cases where normal navigation routes and shipping lanes are affected, except where military necessity does not permit.

- 10.50 A maritime exclusion zone must be declared to all belligerent neutral states. In particular, information must be provided on the commencement, duration, location, and extent of the zone.

#### EXAMPLE 2: MARITIME EXCLUSION ZONE DURING THE FALKLANDS WAR

In connection with the Falklands War (1982), the United Kingdom established a zone which functioned as a maritime exclusion zone around the Falkland Islands. The zone was termed a “total exclusion zone”, and applied both at sea and in the air. It stretched 200 nautical miles out to sea, measured from a point at the middle of the island. The normal method for measuring maritime zones is to measure from the baselines.

The UK’s declaration of the zone stated that the zone applied to all types of vessels and aircraft operating in support of the unlawful occupation of the Falkland Islands. It was also stated that all vessels or aircraft, whether military or civilian, observed in the zone without valid permission from the British authorities would be assumed to be operating in support of the occupation. They would therefore be regarded as hostile and could be the object of attack. The British authorities notified the Argentinian authorities of this zone by way of the Swedish Embassy in Buenos Aires.

The rules clearly state that the same target identification requirements apply both inside and outside the zone, and the British, too, are bound by these rules. To qualify as a lawful target, a vessel must be used in a manner that constitutes direct participation in hostilities. During the Falklands War, it was suspected that civilian vessels were contributing with intelligence in the form of information on the positions of British vessels.

It is still debated whether the British, through this declaration, intended to lower the threshold for identifying vessels as lawful military targets, making the “total exclusion zone” something new and different from a maritime exclusion zone. The lawfulness of a zone depends on how it is enforced in practice, not what is declared. In this case, the maritime zone was enforced in accordance with the law of armed conflict, so what it was called is of less relevance.

### *Control of the immediate vicinity of maritime operations*

- 10.51 In addition to establishing maritime exclusion zones, belligerent parties are entitled to establish control measures in the immediate vicinity of maritime operations.<sup>47</sup> This is the area in which hostilities occur or the belligerent parties in fact operate, and in which the presence of unknown vessels will be regarded as a significant threat. The definition of “immediate vicinity” will depend on the situation, potential threats, and whether the incident is occurring on the high seas or in an international strait. It is therefore impossible to define “immediate vicinity” in general terms. The right to establish control measures in the immediate vicinity of maritime operations has evolved through the practice of states as a consequence of their need to control the vessels travelling around the area of operation.
- 10.52 The right to exercise such control applies to vessels and aircraft belonging to belligerent parties and neutral states in the immediate vicinity of the area of operation. Control measures will often be established to reduce the risk of neutral vessels or civilian enemy vessels suffering incidental damage, injury or loss, or to protect a party’s own forces. In such cases, “warning zones” may be established to keep other vessels at a certain distance, or to control or restrict access to the area.
- 10.53 The measures imposed must not hamper neutral vessels from accessing neutral waters or international straits, unless alternatives are available in the form of almost equally serviceable sea lanes which remain open.
- 10.54 The right to exercise control of the immediate vicinity of maritime operations and, in relevant cases, to establish warning zones, does not exempt a party from its obligations under the law of armed conflict. Accordingly, such measures must not be interpreted as anything more than systems for notifying other ship and air traffic. The intention is simply to clarify the situation.

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<sup>47</sup>SRM, Article 108.

## ***Surrender***

- 10.55 At sea, surrender occurs by lowering the vessel's flag or otherwise clearly expresses an intent to surrender, for example by radio communication.

## **Shipwrecked, wounded and sick persons and the duty to assist**

- 10.56 As soon as combat activity has ended, belligerent parties shall search for and collect shipwrecked, wounded and sick persons, irrespective of affiliation and nationality.<sup>48</sup>
- 10.57 Wherever possible without exposing vessels, crew or passengers to serious risk, warships shall also rescue persons in distress at sea as quickly as possible, to the extent that this can reasonably be expected of the vessel in question. What can reasonably be expected must be evaluated in the context of, among other things, the military situation in the area, operational security, the distance to persons in distress at sea, and any other rescue resources present in the area.<sup>49</sup>

## **Measures relating to civilian ship traffic**

- 10.58 In the context of maritime operations, it may be necessary to implement measures relating to civilian ship traffic. Such measures will often be necessary to ensure that no contraband is transported to the enemy. The measures described in this section are considered to be acts of war, and may only be lawfully undertaken by warships. They may entail greater or lesser use of force, but will fall below the threshold for being defined as attacks.

## ***Visit and search of merchant vessels***

- 10.59 Warships have a right to visit and search merchant vessels outside neutral waters where there are reasonable grounds for suspecting that they are subject to capture.<sup>50</sup> The purpose of visit and search is to establish the affiliation of the merchant vessel, i.e. whether it is hostile or neutral, the type of cargo aboard, the type of crew aboard and to gather information which may shed light on the relationship of the vessel with the armed conflict. As an alternative to visit and search, a neutral merchant vessel may, with its consent, be diverted to another port.<sup>51</sup>

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<sup>48</sup> *Geneva Convention II, Article 18.*

<sup>49</sup> *UNCLOS, Article 98.*

<sup>50</sup> *SRM, Article 118.*

<sup>51</sup> *SRM, Article 119.*



- 10.60 The right to visit, search and in relevant cases capture merchant vessels rests on the fact that a belligerent party would otherwise be able to outsource the transportation of war material and other military supplies to civilian merchant vessels and thereby evade control. If it is, or becomes, clear that a vessel belongs to the enemy, it may be captured and seized in accordance with the rules described in section 10.74 onwards. Special rules govern the capture of neutral vessels; see section 10.79 onwards.
- 10.61 Enemy private property at sea is not protected from visit, search and, in relevant cases, capture. Both vessels and cargoes may be confiscated by the enemy. The cargo of neutral merchant vessels, however, may only be confiscated if it is contraband. It is disputed whether neutral vessels may also be confiscated in such cases. A vessel may always be confiscated if it must be regarded as contraband in itself, for example where it is likely that the vessel will be converted into a support vessel for one of the parties or into a warship, or if more than half of its cargo constitutes contraband.

### *Determining whether a vessel has enemy character*

- 10.62 The national affiliation of the vessel may be difficult to determine, since shipping is international and because it is possible to change flag states very quickly, even while a vessel is at sea.
- 10.63 Merchant vessels sailing under the flag of an enemy state is conclusive evidence of its enemy character. In other words, such vessels may be treated as hostile until indications are received that they are neutral.<sup>52</sup> In this context, “enemy character” simply means that a vessel is affiliated with a state which is an enemy in an armed conflict, not that the vessel is a lawful target or that it is participating in hostilities.
- 10.64 Merchant vessels sailing under the flag of a neutral state are assumed to be neutral unless there are grounds for concluding that they belong to the enemy.<sup>53</sup> If there are indications that a vessel, despite belonging to a neutral state, is acting in support of the enemy, it may become a lawful target. For example, there may be indications that the vessel is transmitting information to the enemy about the positions of warships.
- 10.65 If it is suspected that a vessel sailing under a neutral flag has enemy character, the vessel may be visited and, in relevant cases, searched. If reasonable grounds remain for suspecting that the vessel has enemy character, it may be

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<sup>52</sup> SRM, Article 112.

<sup>53</sup> SRM, Article 113.

captured as a prize and submitted to a prize court for determination of whether it may be confiscated.<sup>54</sup> If there is a need for such a ruling, the Norwegian authorities will be involved through Norwegian Joint Operational Headquarters.

### ***Exceptions from the rule on visit and search of neutral merchant vessels***

- 10.66 A neutral merchant vessel is exempt from visit and search if it meets the following conditions:
- it is bound for a neutral port, and
  - it is under the convoy of an accompanying neutral warship of the same nationality or of another neutral nationality under an agreement with the flag state of the merchant vessel, and
  - the flag state of the neutral warship warrants that the neutral merchant vessel is not carrying contraband or otherwise engaged in activities inconsistent with its neutral status, and
  - the commander of the neutral warship provides, if requested, all information as could otherwise be obtained by visit and search of the merchant vessel.<sup>55</sup>

### ***Procedures for visit and search of merchant vessels***

- 10.67 Generally, the right to visit and search shall be exercised tactfully and cautiously, although measures necessary to protect a party's own forces, and use of force as necessary, are permitted.
- 10.68 Before calling a vessel to be visited and searched, the warship conducting the visit or search shall raise its flag. Such a call may be made by radio, the firing of warning shots, the use of international flag signals or by other recognised means. If the called vessel is neutral, it is obliged to stop, heave to and display its flag of nationality. If the called vessel has enemy character, it is entitled to resist visit and search by means of force, although if it chooses to ignore the call, it will run the risk of damage.
- 10.69 If the called vessel flees, it may be pursued and necessary force may be used to stop it.

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<sup>54</sup> SRM, Article 114.

<sup>55</sup> SRM, Article 120.

- 10.70 When a called vessel has heaved to, a boat or helicopter carrying at least one officer shall be dispatched to conduct the visit and search. Any arming of officers and crew who are to conduct a visit and search shall be decided by the commander of the vessel. If it is deemed irresponsible or impossible to conduct the visit and search of a neutral merchant vessel at sea, the vessel may be redirected and, if appropriate, escorted to the closest location at which a visit and search can take place.



*Norwegian Armed Forces commandos boarding a ship during the Gemini 2010 exercise. Photo: Torbjørn Kjosvold/Norwegian Armed Forces Media Centre.*

- 10.71 The boarding officer should first check the vessel's papers to establish its nationality, port of departure and port of arrival, type of cargo and type of crew, and all other important information. The following documents should normally be on board and can thus be demanded:

- registration documents
- crew list
- passenger lists
- log
- bills of lading, if any
- invoices or list of cargo
- in relevant cases, a consular or similar declaration confirming that the cargo is not contraband

- 10.72 Even if a document inspection appears to indicate that the vessel, crew, passengers and cargo are in order, this does not prevent the interrogation of crew members and a search of the vessel if doubt remains. An example of a situation in which doubt may remain is when there is credible intelligence that the vessel is carrying contraband.
- 10.73 Unless operational security indicates otherwise, the boarding officer shall enter information about the visit and any search in the log of the inspected vessel, including the date and time of the incident. The information entered in the log shall be confirmed by the boarding officer by means of signature and notation of rank. Neither the name of the boarding officer's own vessel nor the name and rank of the military commander of the vessel need to be recorded.

### *Capture of enemy vessels and cargoes*

- 10.74 As a main rule, all enemy vessels may be captured outside neutral waters. No prior visit and search is required. When an enemy vessel is captured, the goods aboard may be captured.<sup>56</sup>
- 10.75 Capture is effectuated by taking command of a vessel and putting a prize crew aboard. The vessel will then normally be taken to a port for seizure, potentially after consideration by a prize court.<sup>57</sup> Diversion to a different destination is an alternative to capture.
- 10.76 If military considerations indicate that an enemy merchant vessel which has been captured should not be taken to port as a prize, it may be destroyed. Such military considerations may include that the capturing warship is unable to leave the area due to the military situation. In such cases, provision must be made for the safety of the crew and passengers, and the vessel's documents must be taken into safekeeping. The lifeboats and life rafts of the vessel shall not be deemed a safe place for the crew and passengers, if any, unless the weather conditions, proximity of land or presence of other vessels capable of taking them on board indicate otherwise.<sup>58</sup> Wherever feasible, the personal effects of the crew and passengers should also be saved.<sup>59</sup> The destruction of passenger ships which carry only civilian passengers is prohibited.<sup>60</sup>

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<sup>56</sup> SRM, Article 135.

<sup>57</sup> *Act relating to prize rules and prize courts of 2 May 1947* No. 1.

<sup>58</sup> *London Protocol rule no. 2.*

<sup>59</sup> SRM, Article 139.

<sup>60</sup> SRM, Article 140.

EXAMPLE 3: DESTRUCTION OF AN ENEMY MERCHANT VESSEL:  
THE SINKING OF THE SS JERN IN THE NORTH SEA, 28 SEPTEMBER 1939

Just a month after the outbreak of World War II, the almost 60-year-old SS Jern, an 852-gross-tonne vessel under the command of Captain Gabrielsen, was stopped by the German submarine U-32 under the command of Lieutenant-Commander Büchel. The SS Jern was en route from Oplø in Nord-Trøndelag to the River Thames in England with a cargo of wet pulp. The German submarine captain declared the cargo to be contraband and gave the crew 15 minutes to leave the ship. Initially, the crew was ordered aboard the German submarine. From there, five men were forced to accompany the Germans back onto the SS Jern to place explosive charges, since Büchel had decided that it should be sunk. At 3:37 p.m., the SS Jern sank about 85 nautical miles west of Jæren Reef. The German submarine took the crew of the SS Jern towards shore and then transferred them to the Swedish cargo boat Caledonia. The group was later put aboard the torpedo boat Lyn, which brought them to Kristiansand.

Source: Handelsflåten i krig 1939–1945 [The merchant marine at war 1939–1945], Vol. 1, Grøndahl Dreyer (1992).

10.77 The following vessels shall not be captured:<sup>61</sup>

- hospital ships (see further discussion of such ships in sections 5.39–41)
- other medical transports, so long as they are needed for the wounded, sick and shipwrecked on board
- small craft used for coastal rescue operations
- vessels granted safe conduct by agreement between the combatant parties including:
  - vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the civilian population, and vessels engaged in rescue operations
  - vessels engaged in transporting cultural property under special protection (see the definition of cultural property in section 7.24 onwards)
- cartel vessels, e.g. vessels involved in the transport of prisoners of war
- small coastal fishing vessels and small boats engaged in local coastal trade
- vessels designed or adapted exclusively for responding to pollution incidents in the marine environment when actually engaged in such activities

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<sup>61</sup>SRM, Article 136.

- vessels charged with religious, non-military scientific or philanthropic missions (though vessels collecting scientific data of likely military application are not exempt from capture)

10.78 The vessels listed above are only exempt from capture if they fulfil the following criteria:<sup>62</sup>

- they are employed in their normal role
- they submit to identification and visit when required
- they do not intentionally hamper the movement of combatants, and
- they obey orders to stop or move out of the way when required

### *Capture of neutral vessels and cargoes*

10.79 Neutral merchant vessels are subject to capture outside neutral waters if they participate actively in activities which make them a lawful target, or if it is determined as a result of visit and search or by other means that they:

- are carrying contraband
- are transporting persons belonging to the armed forces of the enemy
- are operating directly under enemy control, orders, charter or other direction
- are unable to present satisfactory documentation (see section 10.71)
- are violating regulations established by a belligerent state in the immediate vicinity of maritime operations, or
- are breaching or attempting to breach a blockade.<sup>63</sup>

10.80 Cargo aboard a neutral merchant vessel may only be captured if it is contraband.

10.81 Wherever possible, the destruction of neutral merchant vessels shall be avoided, and may only occur if it is clear that it will be impossible to take the vessel to port, redirect it or release it. When a captured neutral merchant vessel is to be destroyed, the same safety precautions must be taken as in connection with the destruction of a corresponding enemy merchant vessel; see section 10.76. In particular, account must be taken of the safety of the crew and passengers.

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<sup>62</sup>SRM, Article 137.

<sup>63</sup>SRM, Article 146.

# 11

## Air operations

### Introduction

- 11.1 This chapter discusses issues particular to air operations during armed conflict, and must be read in conjunction with the rest of the manual.



*Different types of Norwegian military aircraft: a Hercules transport plane, an Orion surveillance plane and a DA-20 Jet Falcon. The picture was taken in connection with the celebration of the 100<sup>th</sup> anniversary of the Royal Norwegian Air Force. Photo: Torgeir Haugeard/Norwegian Armed Forces Media Centre.*

### Airspace and area of operation

- 11.2 International law permits the aircraft of a state to operate freely in the state's own airspace and international airspace. States are nevertheless free to regulate air traffic in national airspace, and in Norway there are numerous air traffic regulations that must be respected. National airspace is the airspace above a

state's land and territorial sea. International airspace is the airspace above sea areas which are not territorial waters, i.e. above international waters and the exclusive economic zones of coastal states. As a rule, these zones extend 12 nautical miles from the coast. Flights into the airspace of another state require an agreement, or diplomatic clearance from the state in question. Further, clarification is required of the extent to which national restrictions on the use of airspace adopted by the states in question must be complied with. Flights into outer space are also permitted. The upper limit on national airspace is not officially defined. However, there is general agreement that national airspace ends where air density becomes so low that the physical conditions allow modern-day satellites to maintain an orbit around the Earth. Today that is about 100 kilometres above the Earth's surface, although this may change as technology develops. Currently, military use of outer space is relevant largely for missiles whose trajectories may pass through outer space.

- 11.3 Unlike naval vessels, military aircraft have no right of innocent passage across the territory of other states (see section 10.13 for the definition of innocent passage). Nevertheless, aircraft may fly over international straits connecting two international waters or exclusive economic zones, even if there is an overlap between the territorial seas and thus of national airspace.<sup>1</sup> Flights are likewise permitted over archipelagic waters (see section 10.9), provided that they are made over recognised sea lanes.<sup>2</sup> This is called transit passage, and must be done without delay and without threatening or employing armed force. Aircraft must operate in their normal mode, i.e. the setting customarily used by a military aircraft during flight.<sup>3</sup> In the case of airplanes, this will mean flying at cruising altitude. This requirement does not prevent military aircraft from flying in formation.
- 11.4 In an international armed conflict, military aircraft belonging to a party to the conflict may of course fly over enemy territory or territory occupied by the enemy without requiring any form of permission or approval. However, medical aircraft must apply for permission to fly into areas controlled by the enemy. This requirement is intended to ensure the protection of medical aircraft. Medical aircraft flying over areas under the physical control of the enemy without permission or in contravention of conditions for such permission are required to take all possible steps to announce their presence to the enemy and explain the circumstances. As soon as the enemy recognises a medical aircraft, it may order the aircraft to land or issue other orders that the enemy considers necessary to protect its interests, although it shall give the

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<sup>1</sup> *United Nations Convention on the Law of the Sea (UNCLOS)*, Article 38.

<sup>2</sup> *UNCLOS*, Article 53.

<sup>3</sup> *UNCLOS*, Article 39.



aircraft time to comply with any order before resorting to an attack.<sup>4</sup> Medical aircraft are discussed further in sections 5.33–38.

- 11.5 If an aircraft needs to make an emergency landing due to *force majeure* or some other emergency situation, this shall be taken into account such that the aircraft is permitted to land in the territory of another state. Not all countries recognise this right for state and military aircraft, but there has rarely been a problem as very few states fail to recognise the right. During armed conflict, the right to make an emergency landing will only apply in neutral territory.
- 11.6 Acts of war may only take place in the airspace of the belligerent parties and in international airspace.

## Categories of aircraft

- 11.7 The term “aircraft” can signify craft that are manned or unmanned, armed or unarmed, heavier or lighter than air, and powered or unpowered. It includes both airplanes and helicopters, irrespective of function and size.
- 11.8 Norway operates with three categories of aviation: civil aviation, military aviation and other national aviation with a public law purpose.<sup>5</sup> Civilian aircraft are all aircraft which are not state aircraft. State aircraft are aircraft owned or used by the state for non-commercial (under public law) purposes, for example by the military, police and customs authorities. Military aircraft are defined further in section 11.9. The nationality of an aircraft is determined by the country in which it is registered. In armed conflict, of course, a distinction is made between military objects and objects which are not military (“civilian”). This means that both civilian aircraft and state aircraft which are not military are regarded as “civilian” objects which must in principle be protected from direct attack.
- 11.9 Military aircraft are generally defined as aircraft used by the armed forces of a state.<sup>6</sup> Such aircraft must be clearly marked to indicate both nationality and military status, and must be under military command. Several countries including Norway and the United Kingdom use unique military markings (roundels) as a mark of nationality. Military aircraft shall be controlled, crewed or pre-programmed by a crew subject to a system of military discipline. An

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<sup>4</sup> Geneva Convention I, Article 36, third paragraph; Geneva Convention II, Article 39, fourth paragraph; Additional Protocol I, Article 27.

<sup>5</sup> Act relating to aviation (the Aviation Act), LOV-1993-06-11 no. 101.

<sup>6</sup> SRM, Article 13(f).

aircraft is considered a Norwegian military aircraft if it is entered in the military aircraft register or, in the case of a civilian aircraft, if it is temporarily used as a military aircraft.<sup>7</sup> In such cases the aircraft must be marked with a special additional marker, and the air traffic authority must be notified beforehand.<sup>8</sup> The same rules apply to any use by the Norwegian state of foreign craft for military aviation purposes.<sup>9</sup>



*Norwegian F-16 (with nationality markings) ready for take-off at Souda Air Base on Crete during Operation Unified Protector. Photo: Torbjørn Kjosvold/Norwegian Armed Forces Media Centre.*

- 11.10 State aircraft are generally immune to the laws of other countries relating to boarding, visit, search and inspection without consent.<sup>10</sup> This applies, in principle, also to military aircraft, but only in peacetime. If military aircraft are involved in an armed conflict, they will not be immune to activities such as boarding. As stated, an agreement or prior approval will be required to fly through the airspace of another state, unless the parties are involved in an international armed conflict. In the case of military aircraft flying in peacetime, diplomatic clearance is required. Such clearance may be conditional on mandatory inspection of the aircraft in question.

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<sup>7</sup> *Aviation Act*, section 17-2.

<sup>8</sup> *Aviation Act*, section 17-10.

<sup>9</sup> *Aviation Act*, section 17-11.

<sup>10</sup> UNCLOS, Article 95.

- 11.11 Only military aircraft have the right to participate directly in hostilities. If other aircraft are to be used, they must be converted into military aircraft by means of registration and marking.

## Control of airspace

- 11.12 In some cases, military necessity or public security will indicate a need to restrict or deny use of airspace. This is done by establishing a zone in which the use of airspace is restricted or prohibited. Such measures have to be temporary, and must be communicated by means of a Notice to Airmen (NOTAM).<sup>11</sup> In peacetime, the Civil Aviation Authority–Norway has authority to close Norwegian airspace, while in the case of armed conflict this authority will be delegated to the Norwegian Armed Forces. The establishment of such a zone will not affect the duties and rights of the state under the law of armed conflict. For example, the rules on distinction, proportionality and precautions will still apply. Civilian aircraft which enter such zones do not lose their protection. It is not permitted to decide that all aircraft flying into an area are lawful targets, and protected aircraft do not lose their protection simply due to entering such an area. Nor may such zones have the purpose of restricting the enemy's access to supplies. This function may only be achieved by establishing a blockade. It may, however, be an incidental consequence of establishing a restriction zone, and in such cases this will not influence the lawfulness of the zone.

## *Restricted areas (warning zones/prohibited areas)*

- 11.13 A restricted area is an area established to warn others of increased risk associated with entering the area, whether in peacetime or during armed conflict. A zone may be established, for example, to protect forces surrounding naval vessels conducting an operation, or because an ongoing military exercise raises the security level in the relevant area. Restricted areas may also be established in emergency situations or to ensure public safety. Such zones may be established in national airspace and, in exceptional cases, in international airspace, but must be temporary and communicated by means of a NOTAM to other states and affected parties. Moreover, the restrictions must be the same for all aircraft whose flight fits the definition of the type being restricted.<sup>12</sup>

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<sup>11</sup> *Convention on International Civil Aviation of 7 December 1944 (the Chicago Convention), Annex 15.*

<sup>12</sup> *Chicago Convention, Article 9.*

- 11.14 Restricted areas are established to keep air traffic at a distance and to communicate that if aircraft enter an area they will face an increased risk of armed force being used against them in defence of the object protected by the restriction. If a party breaches a prohibition or restriction, it will normally only be permitted to require the party to land as quickly as possible at a suitable designated location.<sup>13</sup> In certain situations, if repeated warnings have been given and an aircraft nevertheless proceeds into a restricted area, it may be permissible to employ armed force to stop it.
- 11.15 Restricted areas may not be used as a means of warfare, only as a security measure. Accordingly, restricted areas are subject to strict limitations which must generally be authorised at a high level, particularly if they will affect civilian passenger aircraft or are introduced in peacetime.

### *Exclusion zones*

- 11.16 In international armed conflicts, restriction of access to a defined part of international airspace may be required by military necessity. Such restrictions will generally apply to both air and sea traffic. The extent of restriction, area and time must all be proportionate to the military advantage to be achieved, and the details must be communicated to the parties by means of a NOTAM. Such zones must not hinder neutral countries from accessing international airspace without alternative routes being provided which offer the same degree of security and accessibility. Account must also be taken of neutral states' use of their economic zones and continental shelves, meaning that the military advantage must be proportionate to the inconvenience caused to such neutral states. Finally, the party establishing the zone must be capable of enforcing it effectively.
- 11.17 An aircraft which enters such an area loses none of its rights under the law of armed conflict, and must be identified in the usual manner to determine whether it is a lawful target. The advantage of such zones is that the majority of aircraft will not wish to enter, making it easier to identify and maintain an overview of aircraft that are actually present.

The use of exclusion zones is discussed further in sections 10.45–50.

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<sup>12</sup> *Chicago Convention, Article 9.*

<sup>13</sup> *Chicago Convention, Article 9.*

## *No-fly zones*

- 11.18 If there is a need to restrict air traffic in a party's own airspace or that of the enemy during an armed conflict, a no-fly zone may be established. No-fly zones may be established even in the absence of an armed conflict, provided that the UN Security Council authorises it in a resolution. Such zones may not be established in international airspace, and they apply only to aircraft. The details of any zone must be communicated to civilian air traffic that may be affected. There is no requirement to inform enemy military aircraft, as these will be lawful targets. In most cases, however, it will be necessary to announce the no-fly zone, for example if its purpose is to force enemy military aircraft to remain on the ground.
- 11.19 No-fly zones may be enforced using lawful means and methods of armed conflict, such as fighter planes or missiles, although the use of such means and methods must be grounded in military necessity. In addition, all necessary and feasible precautions must be taken to ensure that only lawful targets are attacked, and any unavoidable incidental civilian damage, injury or loss must be proportionate. Being present in such a zone may be deemed an indicator of hostile intent, but will not by itself constitute adequate grounds for attack.

### EXAMPLE 1: NO-FLY ZONE OVER LIBYA 2011

Operation Unified Protector, NATO's operation in Libya in 2011, in which Norway participated, was given a UN Security Council mandate to establish and enforce a no-fly zone over Libya under resolution 1973 (2011). The no-fly restriction applied to all flights other than purely humanitarian flights and flights necessary to enforce the no-fly zone and protect civilians on the ground in Libya.

## *Targeting and methods of warfare*

- 11.20 The rules presented in the rest of the manual, particularly the rules on targeting principles and precautions (chapter 2), means of warfare (chapter 8), who and what constitute lawful targets (chapters 3 and 7), and protected persons and objects (chapters 4 and 7), also apply to air operations. All use of force must be militarily necessary. This means that each target must be a lawful target and that it must be possible to implement a planned attack without causing disproportionate damage or injury to civilians or civilian objects. Even though the rules are the same, applying them in the context of air operations may pose challenges different from the challenges faced, for example, in land operations.

## *Lawful targets*

- 11.21 The general rules governing which targets may lawfully be attacked and which are protected also apply to aerial attacks (see chapters 3–5 and 7).

## *Military aircraft*

- 11.22 Military aircraft, as defined above, are lawful targets provided that they belong to a party to a conflict. Such aircraft may be attacked and destroyed in all airspace not belonging to a neutral state, i.e. in international airspace and airspace belonging to one of the parties to the conflict. Military aircraft may also be captured, provided that this does not occur in the jurisdiction of a neutral state.<sup>14</sup> Medical aircraft enjoy special protection and shall not be attacked; see chapter 5 on the medical services. In addition, any aircraft the parties have agreed to protect shall not be attacked. An example of such an agreement may include an understanding to grant protection to aircraft used to return prisoners.<sup>15</sup>

## *Paratroopers and other combatants using parachutes*

- 11.23 Paratroopers and other combatants using parachutes are lawful targets alongside other combatants, both while they are in the air and after they have landed on the ground, unless they express an intent to surrender. Persons parachuting from an aircraft in distress, however, are not lawful targets, and must be given opportunity to surrender after landing.<sup>16</sup> If such persons fail to surrender at the first opportunity after landing, they will be lawful targets alongside other ground forces, with the rights and duties this entails. If they choose to remove their uniforms to avoid capture, they risk, like other soldiers who remove their uniforms, being suspected of espionage if captured; see sections 9.46–49.

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<sup>14</sup> SRM, Article 135.

<sup>15</sup> SRM, Article 53.

<sup>16</sup> Additional Protocol I, Article 42.



*Army paratroopers parachuting from 335 Squadron's C-130H Hercules Froy, over Rena. Photo: Torbjørn Kjosvold/Norwegian Armed Forces Media Centre.*

### Civilian aircraft and military aircraft belonging to a neutral state

- 11.24 Civilian aircraft and military aircraft belonging to a neutral state shall generally not be attacked, but will lose their protected status if they operate in support of a party to a conflict. In order for such aircraft to lose their protection, they must operate in a manner that effectively contributes to the enemy's military action.<sup>17</sup>

This may include the following:

- Participating in hostile acts in support of the enemy, for example by intercepting or attacking an aircraft, attacking persons or objects on the ground or at sea, being used as a means of attack, participating in electronic warfare, or procuring targeting information for enemy forces.
- Facilitating enemy military operations, for example by transporting troops or military equipment or acting as a tanker for aerial refuelling purposes.
- Being part of or participating in the enemy's information-gathering system, for example by engaging in reconnaissance, early warning, surveillance or command, control and communication assignments.
- Refusing to comply with orders from military authorities, for example an order to land, submit to inspection or capture in cases where there is a clear suspicion that the aircraft is carrying contraband, or by clearly seeking to avoid interception.

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<sup>17</sup>SRM, Articles 63 and 70.

- Otherwise making an effective contribution to the enemy's military operations.

### Lawful targets on land

11.25 As regards targets on land, see the general rules on objects in chapter 7.

### Lawful targets at sea

11.26 As regards lawful targets at sea, such as warships, and the conditions governing the protection of ships and boats, see chapter 10 on maritime operations.

## *Particular challenges linked to aerial warfare*

### Precautions in attack

11.27 Those who plan or decide upon an attack shall take all feasible precautions to ensure that planned targets are lawful targets and are neither civilians nor civilian objects and are not entitled to special protection. This is particularly important in the pre-planning of long-range attacks, which air operations often are. In many cases, the feasible precautions available to pilots to ensure that their targets are lawful targets will be relatively limited in practice. Those who plan such operations will therefore have a special responsibility to verify that an object or person is a lawful target. The content of the term “feasible precautions” is explained in section 2.6, while challenges relating to indirect fire are discussed in sections 2.31– 33.



*UAVs are aircraft like any other, including fighters, and shall be used in compliance with the rules of the law of armed conflict. Photo: Armoured Battalion/Norwegian Armed Forces.*



- 11.28 Those who conduct an attack are responsible for taking all feasible precautions to identify the target which has been pre-cleared as a lawful target, so that the attack focuses on the intended person or object. The standard of adequate identification will be specified for each individual operation. The precautions considered feasible in identifying a target in a given situation, whether in the air, at sea or on the ground, will vary according to the type of aircraft involved. For example, helicopters fly more slowly and at lower altitude, making it easier to see a target even in cloudy conditions, whereas fighters can maintain a safer distance from threats and may thus take longer to verify a target.
- 11.29 Further, those who conduct an attack are responsible for assessing whether the situation is changing. If it becomes apparent that a target is not lawful, or that an attack will entail disproportionate civilian losses, the attack must be cancelled or suspended. For example, a person who has been identified as a lawful target will no longer have this status if it becomes clear to a helicopter pilot or ground personnel that the person is wounded and/or wishes to surrender. However, it will be difficult for a fighter pilot to see whether a person on the ground is wounded. If the person conducting the attack has no real opportunity of discovering such a change in circumstance, they will not be expected to cancel or suspend the attack.
- 11.30 In the case of ground and sea targets, the following factors may be used for identification purposes, depending on the adopted operational requirements:
- visual identification by a pilot or ground personnel
  - electro-optical sensors, infrared sensors or radar sensors
  - drone imagery
- 11.31 There is no requirement under international law to maintain visual contact with the target, although this may be a condition in some operations. In such cases the condition will be included in operational plans, orders and directives, such as standard operating procedures (SOPs) or rules of engagement (ROE). One way of securing and maintaining visual contact with the target is to use ground forces with particular expertise (such as forward air controllers) who can see the target and communicate with the aircraft. Such qualified personnel may also assist in assessing whether there is a risk of incidental civilian damage, injury or loss, and will be in a better position to notice situational changes that increase the risk of incidental civilian damage, injury or loss, so that an attack may have to be suspended or cancelled.

11.32 In the case of aerial targets, the following factors, among others, may be used to identify a target, depending on the mission specific requirements:

- reply to radio warnings
- IFF (Identification Friend or Foe)
- infrared signature
- radar signature
- electronic signature
- number of aircraft and formation
- altitude, speed, direction, profile, etc.

#### EXAMPLE 2: ATTACK WITHOUT VISUAL IDENTIFICATION

In air operations unsupported by ground forces, it may be difficult to achieve visual contact with a target, particularly if weather conditions make it hard to see the target from the aircraft. This does not mean an attack is prohibited, but greater knowledge of the target and its surroundings will be required.

For example, a fighter aircraft may be tasked with destroying a building specified by means of coordinates. The target has been identified as a lawful target, and the coordinates ensure that the correct building will be attacked. The challenge is to prevent or reduce incidental civilian damage, injury or loss, particularly to persons located near the building, as their positions are harder to determine than that of the building itself. In such cases, very thorough awareness of the situation on the ground is required. Is this an area where civilians tend to be present, or are there usually no civilians in the area? Is there a time of day or certain day when fewer civilians are present? It is also important that one's situational understanding be as up-to-date as possible, to minimise the likelihood of a change in circumstances.

11.33 Responsibility for conducting the proportionality assessment prior to attack rests with the person who possesses sufficient information to undertake such an assessment. This means the person with sufficient overview of the situation and of the larger operational context of the attack to assess the expected, but unintended, damage in relation to the military advantage anticipated. Personnel of lower rank have a responsibility primarily to judge whether the situation is changing or turns out to be different from what had been anticipated when the attack was planned, or if the planned actions appear clearly unlawful.<sup>18</sup> This applies to all types of pre-planned operations, but is particularly relevant to air operations since these are often pre-planned.

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<sup>18</sup> *Military Penal Code, section 24.*

## Choice of means and methods

- 11.34 Chapter 8 on means of warfare (weapons) and chapter 9 on methods of warfare address general rules governing the choices of means and methods. These apply to air operations as well. The gist of these rules is that the available means and methods are restricted by the requirement that they not cause unnecessary suffering or superfluous injury, and that they must make it possible to distinguish between lawful targets and protected persons and objects. To reduce injury to the civilian population, it is important to assess the choices of means and methods on the basis of the geographical proximity of a target to the civilian population, the effects of the selected weapon, weather conditions and other factors.



*To reduce the risk of collateral damage, weapons and methods must be selected that avoid or reduce such risk. For example, in some cases, direct fire from a helicopter may be more appropriate than fire from a fighter jet. Photo: Norwegian Armed Forces.*

- 11.35 The use of indirect fire, i.e. instances where the person firing the weapon does not see the target, will normally entail a greater risk of unforeseen consequences than direct fire (see further discussion in this regard in section 2.32). To reduce this risk, restrictions may be placed on the direction from which a weapon is deployed. For example, if more civilian objects and civilians

are located north and south of a target, it will be appropriate to deliver a bomb on an east-west axis. This will reduce the risk of the bomb hitting civilians or civilian objects if it lands short of the target or overshoots it. Additional consideration will be given to whether the foreseeable impact of the bomb on the target, including the resulting pressure wave and fragments, can be reduced.

- 11.36 There is no requirement that precision-guided munitions must always be used if available. Nevertheless, there will be instances in which an attack cannot be conducted lawfully without using such weapons, due to a substantial risk of disproportionate civilian losses if less precise weapons are used. In addition, the purpose of an operation may necessitate stricter requirements regarding the use of precision-guided munitions, particularly if the intention is to protect civilians. This was the case in the NATO-led Operation Unified Protector in Libya in 2011.

### Escalation in use of force

- 11.37 Although there is no requirement under international law to employ the least possible force to engage a lawful target, doing so will often be appropriate. In situations when air support is used to avert an attack or otherwise influence an ongoing situation on the ground, the use of non-kinetic methods may allow the problem to be resolved without exposing civilians and civilian objects to risk. In some instances, this approach will also reduce the risk faced by a party's own ground forces. For example, the presence of air support may have a deterrent effect of its own, and low altitude flybys (show of force) may thus be enough. In such cases, the safety of the aircraft must of course be included in the assessment. If such measures are insufficient or unfeasible in view of aircraft safety, the firing of warning shots may be considered. If warning shots are to be employed, it is important to be aware that they may themselves endanger the civilian population. It is therefore important to consider where such shots will land. Requirements relating to escalation in the use of force and the use of warning shots are often regulated in detail for each operation, in the rules of engagement and other guidelines.

### Proportionality and indiscriminate attacks

- 11.38 It is prohibited to carry out attacks which may be expected to cause injury to civilians or damage to civilian objects which would be excessive compared to the concrete and direct military advantage anticipated of the attack.<sup>19</sup> It is also prohibited to conduct attacks which are not directed at lawful targets, or which treat as a single military objective an area comprising several military objectives located in a concentration of civilians and civilian objects, instead of attacking

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<sup>19</sup>Additional Protocol I, Articles 51(5) and 57(2).

the individual military objectives separately. For more information, see sections 2.16–18 and 2.19–25.

### *Aerial warfare at sea*

- 11.39 The rules defining lawful targets at sea are discussed in detail in chapter 10, on maritime operations. The rules of warfare applicable to air-to-sea operations are otherwise the same as those governing other air operations.

### **Aerial blockade**

- 11.40 Aerial blockade is a method of warfare which may be used in international armed conflict. The purpose is to deny access by aircraft to certain airports or coastal areas belonging to, occupied by or under the control of the enemy, in order to prevent the enemy from using neutral aircraft to transport personnel or equipment to or from the blockaded area.
- 11.41 The conditions for implementing a lawful aerial blockade are taken from the rules on sea blockades, and are discussed in greater detail in the chapter in maritime operations; see sections 10.40–44. The guiding principle is that a blockade must be declared and all states provided with detailed information on it. Where possible, this should be done by means of a NOTAM. Any aerial blockade must be effective and without distinction, i.e. it must stop all aircraft, both with and without cargo, manned and unmanned, irrespective of country of origin. This may mean, for example, that an unmanned aircraft will be shot down if it breaches an aerial blockade. However, the parties to a conflict may agree to allow aircraft used for medical purposes or those granted safe passage to fly through a blockade. Aircraft in distress must be permitted to breach a blockade when necessary. An aerial blockade may be enforced by military aircraft or by other means, including warships, although the choice of means and methods must comply with other rules of the law of armed conflict, and armed force shall only be used as a last resort. In order to satisfy the effectiveness requirement, the party implementing the blockade must have a certain degree of air supremacy.
- 11.42 In non-international conflicts, states are permitted to control the use of their own airspace, but not airspace outside their jurisdiction. There is no requirement for a state to have effective control of the portion of territory where it implements the blockade.

## Surrender

- 11.43 Like other combatants, personnel aboard aircraft are entitled to surrender, although there are no fixed rules on how this should be done in practice. Aircraft wishing to surrender must take all practical steps to communicate this in a clear manner to the enemy. Among other things, the intent to surrender should be communicated via a common radio channel, such as the ICAO emergency frequency. If the enemy is in sight, measures such as wagging the aircraft's wings, lowering the landing gear and flashing navigation lights may express an intent to surrender, although such actions may also be done for other reasons. An enemy may therefore require an aircraft to adopt a particular course, speed and altitude, or to land at an agreed location, to be sure that the aircraft does in fact surrender. If an aircraft fails to comply with such orders, and no acceptable reason is given for failing to do, the aircraft may be treated as a lawful target.
- 11.44 In some situations, the crew of an aircraft may have to parachute from the aircraft to be able to surrender. As with crews leaving an aircraft in distress, such persons will not be lawful targets while in the air, and must be given an opportunity to surrender once they have landed.
- 11.45 The treatment of persons captured from aircraft that has landed, or who have parachuted from an aircraft, depends on the type of conflict (see chapter 6), but all persons shall be treated humanely and with respect.

## Protection of civilian aircraft, airliners and aircraft granted safe passage

### *Civilian aircraft and passenger aircraft*

- 11.46 Civilian aircraft, whether belonging to the enemy, one's own state or a neutral country, are civilian objects and shall not be attacked unless they have lost their protected status; see section 11.24. In this context, "civilian aircraft" means all aircraft which are not military aircraft. This means that aircraft from another state, such as police helicopters, are in principle also entitled to protection as civilian objects.
- 11.47 Civilian aircraft used for passenger traffic, whether or not they are airliners in regular traffic, are entitled to special protection as long as there are passengers on board and the aircraft is not being used to hamper the enemy's movements.<sup>20</sup> Since the risk of civilian losses is great, extra precautions must be taken before an attack on any such an aircraft to ensure that it is in fact a military objective and thus has lost its protected status. For example, it cannot be automatically assumed that a passenger aircraft is a lawful target simply

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<sup>20</sup> SRM, Articles 53(c) and 56.

because it has entered a no-fly zone or similar zone, although this may be regarded as indicating that protected status has been lost. It must also meet the conditions, discussed in section 7.2 onwards, which determine whether an object is a military objective: it must be an object which by its nature, location, purpose or use contributes effectively to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, would offer a definite military advantage.<sup>21</sup> Other indications that a passenger aircraft may be a military objective include:

- The passenger aircraft is located at a military airport in such circumstances that it becomes a military objective.
- The passenger aircraft is used to intercept or attack other aircraft; to attack persons or objects on land or at sea; as an instrument of attack; or to gather information for the enemy.
- The passenger aircraft is transporting troops or military material.

11.48 In other words, the threshold for considering a passenger aircraft a lawful target is higher than for other objects, precisely because the risk of civilian losses is so great. Passenger aircraft may only be attacked if alternative solutions are inadequate and the situation is sufficiently serious to justify an attack despite the potentially severe civilian losses.<sup>22</sup>

11.49 The rules governing when passenger aircraft become lawful targets must be distinguished from the rules allowing authorities to shoot down a passenger aircraft in peacetime if they believe it to be under the control of persons intending to use the aircraft to conduct a terrorist attack (so-called renegades). The Norwegian Armed Forces have been given an independent mandate to handle such situations both in peacetime and when such an attack is considered an armed attack on Norway. The use of force in the context of renegade operations is regulated by special provisions.<sup>23</sup>

### *Aircraft granted safe conduct*

11.50 In some instances, parties to a conflict will agree to grant certain aircraft safe conduct, meaning that neither party will attack them.<sup>24</sup> This is most common in connection with exchanges of prisoners or the transportation of peace negotiators, but may also apply in other circumstances if the parties wish. Such

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<sup>21</sup> *Additional Protocol I, Article 52(2)*.

<sup>22</sup> *SRM, Article 57*.

<sup>23</sup> *Proposition to the Storting No. 48 (2007–2008), page 59*.

<sup>24</sup> *SRM, Article 53(b)*.

protection will normally apply from the time an aircraft departs to fetch the persons concerned, during their transportation, and until the aircraft has returned at the end of the assignment.

- 11.51 For the protection to be effective, the parties should agree how such aircraft are to be identified. This may include preparing a detailed flight plan and the use of codes and altitude information from secondary radar for civilian aircraft.
- 11.52 Protection is lost if an aircraft fails to respect the conditions of an agreement, including by refusing inspection and identification, or if it is deliberately used to hamper an enemy's movements.<sup>25</sup> In addition, the situation causing an aircraft to lose its protected status must be so serious that the aircraft may qualify as a military objective. It is not enough that the crew is armed for self-defence, unless it has been explicitly agreed that they shall have no weapons aboard.
- 11.53 As with passenger aircraft that have lost their protection, aircraft granted safe conduct may only be attacked if alternative solutions are inadequate and the situation is sufficiently serious to justify an attack despite potentially severe civilian losses.<sup>26</sup> In most cases the decision must be taken at a high level, and the aircraft should be given prior warning to allow the crew to alter its behaviour and thus avoid being attacked.

## Methods not involving the use of armed force

- 11.54 Military aircraft are not only used for kinetic attacks on ground, air or sea targets. Other previously mentioned activities include identification, interception and shows of force.

### *Interception, diversion, visit, search and capture*

- 11.55 Interception, diversion, visit, search and, potentially, capture may be relevant where it is suspected that a civilian aircraft is being used for military purposes or to carry contraband such that protected status as a civilian aircraft may be lost (see section 11.24, section 10.18 and section 10.56 onwards). Such measures may also be relevant if an aircraft breaches provisions on restricted areas in the immediate vicinity of maritime operations or breaches or attempts to breach a blockade. Additional information and a greater degree of certainty

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<sup>25</sup> SRM, Article 55.

<sup>26</sup> SRM, Article 57.



are required to capture a civilian aircraft belonging to a neutral country than one of the enemy's civilian aircraft.<sup>27</sup>

- 11.56 Capture is effectuated by intercepting an aircraft. If, after capture, reasonable grounds remain for suspecting that the aircraft is involved in any of the above activities, it may be ordered to land at a suitable location under the control of the relevant belligerent party for the purpose of visit and, potentially, search. Interception may be implemented in the airspace of the belligerent parties or international airspace, i.e. airspace not belonging to a neutral state. If no such landing location is available, the aircraft may instead be redirected from its declared destination. In the case of aircraft from neutral states, their consent to such diversion must first be obtained.<sup>28</sup>
- 11.57 Capture of enemy military aircraft is permitted, but emblems of nationality and military symbols or distinctive emblems must be replaced before an aircraft may be used in military operations.<sup>29</sup> Seizure of an aircraft from a neutral state must be authorised by a special court, referred to as a “prize court”, which must determine whether the aircraft may be confiscated.<sup>30</sup> If such a determination is required, the Norwegian authorities must be involved through Norwegian Joint Operational Headquarters.
- 11.58 Interception and other methods short of use of force may also be used against enemy aircraft as an alternative to the use of force or as part of the escalation of force. In such situations, an enemy aircraft must be identified as a lawful target, rather than, for example, a medical aircraft or aircraft granted safe conduct.

### *Search and rescue*

- 11.59 Military aircraft involved in search and rescue operations will still be lawful targets unless they are protected medical aircraft; see chapter 5. Further, such operations must be conducted in accordance with the general rules of the law of armed conflict.

### *Other activities*

- 11.60 To the extent that other activities do not involve attacks on civilians, and are not otherwise regulated by general prohibitions and restrictions relating to the choice of means and methods, they will not be addressed in this manual.

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<sup>27</sup> SRM, Articles 114–115, 125–134, 141–145, 153–158.

<sup>28</sup> SRM, Article 126.

<sup>29</sup> Additional Protocol I, Article 39.

<sup>30</sup> SRM, Article 116.

Military aircraft may for example be used for propaganda purposes. This activity will generally not be regulated by the law of armed conflict, although it could be if, for example, such propaganda constitutes perfidy by stating falsely that forces have surrendered and must be protected, or if the holders containing such information injure civilians.

# 12

## Control and security measures relating to the civilian population during armed conflict

### Introduction

- 12.1 The preservation of law and order, including suppression of civilian riots and civil unrest is, in principle, a police task. Ordinarily, the tasks and responsibilities of the Norwegian Armed Forces and the police do not change amid crises, while on alert, or during armed conflict. The responsibility of the police to fight crime in peacetime is therefore upheld throughout both crises and wartime. However, the Norwegian Armed Forces may assist the police in accordance with Norway's Instructions on the provision of assistance to the police by the Norwegian Armed Forces.<sup>1</sup> It is the Norwegian Armed Forces' responsibility to respond to any armed attack on Norway in accordance with the right to self-defence under international law. The use of force against enemy combatants must comply with international law (i.e. fall within the framework of the law of armed conflict), and shall always, and only, be dealt with by the Norwegian Armed Forces. The reason for this is that the police are not lawful combatants. During armed conflict, Norway has an obligation under international law to seek to relocate protected civilians (including police officers) away from areas near lawful targets, and to take all feasible precautions to protect civilians against the risks inherent in military operations. If it appears likely under the circumstances that a force may encounter lawful enemy combatants, the operation may be carried out only by units of the Norwegian Armed Forces. Authority may be transferred from the police to the Norwegian Armed Forces under section 3 or section 6 of the Emergency Preparedness Act,<sup>2</sup> but only if, during an emergency or armed conflict, it is necessary for the Armed Forces to take over police tasks such as combatting crime. Such transfers of authority are considered highly unlikely to be necessary.

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<sup>1</sup> Royal Decree of 22 June 2012 No. 581 *Instruks om Forsvarets bistand til politiet* [Instructions on the provision of assistance to the police by the Norwegian Armed Forces].

<sup>2</sup> Act relating to special measures in time of war, threat of war and similar circumstances of 15 December 1950 No. 7 (the Emergency Preparedness Act).

- 12.2 The parties to an armed conflict may take such control and security measures towards a foreign civilian population as may be necessary as a result of the armed conflict.<sup>3</sup> “Foreign civilian population” means a civilian population belonging to an enemy or foreign state in which Norwegian forces are helping to quell internal unrest. This chapter provides an overview of permissible control and security measures and the criteria for their use. Such measures will be very similar or identical to tasks which Norwegian forces may be ordered to perform during operations under the threshold of an armed conflict. However, this chapter discusses only the rules applicable to such measures during an armed conflict. For a description of the special rules on measures pertaining to civilian ship traffic, see section 10.56 onwards; for those pertaining to civilian aviation, see sections 11.46–49 and 11.52–53.
- 12.3 Control and security measures entailing restrictions on the civilian population’s liberty are based, first, on the need of military forces in an armed conflict to examine persons in order to identify combatants, to locate or stop the smuggling of weapons, and to stop spies and infiltrators (persons approaching the enemy to exert influence or conduct espionage). Second, military forces are entitled to take steps which are militarily necessary to protect their own forces, for example by establishing security zones around their own military installations, units or vehicles/vessels.<sup>4</sup> In an armed conflict in which one of the parties operates more or less shielded amongst the civilian population, as in Afghanistan, there will be a substantial need for such control and security measures.
- 12.4 Military operations usually encompass a wide range of activities, from offensive operations against enemy combatants and equipment to activities which are not directly related to combat activity, such as the protection of lines of communication, the control of entry to and exit from combat zones and the handling of large civilian crowds. The types of control and security measures that may be implemented with respect to the civilian population cannot be exhaustively described. However, a general principle is that the more invasive a measure, the weightier its rationale must be. This chapter takes a closer look at control and security measures which may need to be implemented with respect to the civilian population for security reasons, including checkpoints, searches of civilian property and civilians, and crowd control in connection with demonstrations. The most serious

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<sup>3</sup> *Geneva Convention IV, Article 27(4)*.

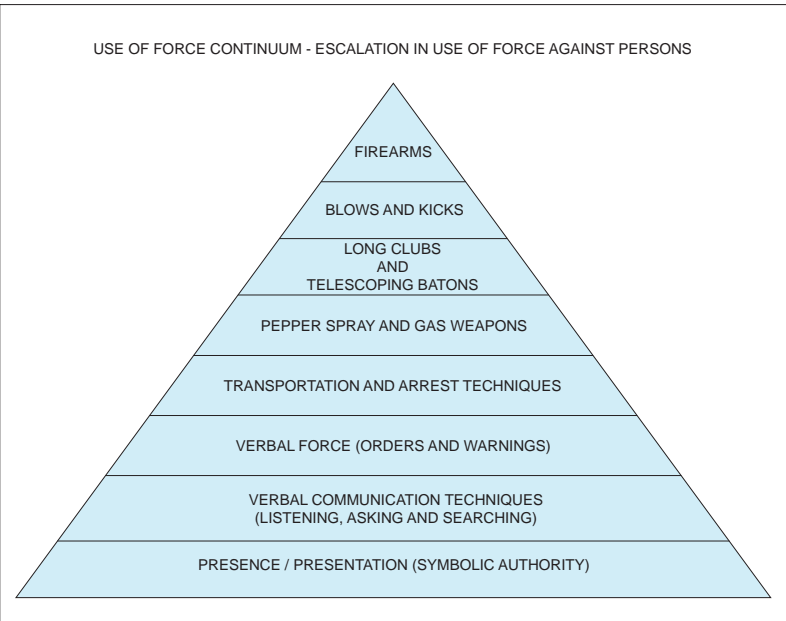
<sup>4</sup> *Geneva Convention IV, Article 27(4)*.

security measure applicable to civilians is internment. This is discussed in section 6.86 onwards, and will not be discussed further here.

- 12.5 Rules governing the conduct of military forces towards the civilian population are also described elsewhere in this manual, particularly in chapter 4 on protection of the civilian population and chapter 9 on the lawfulness of methods of warfare that may have a negative impact on the civilian population.

## Implementation of control and security measures

- 12.6 When military forces exercise authority on security grounds towards civilians, they must follow the general principle that civilians shall be protected and shown respect whenever feasible in view of the measures to be implemented.<sup>5</sup> What is feasible in this regard depends on the level of threat, the types of threat faced, and the time available to deal with a given threat. Operational planning and single tasks must therefore give soldiers time and space to evaluate situations and act accordingly. This may, for example, mean equipping forces with material that enables them to handle an escalation in the use of force reasonably. The provision of less-deadly weapons such as clubs, batons, etc., allows for a level of escalation below the level where deadly weapons are used (see the use of force continuum in the figure below).



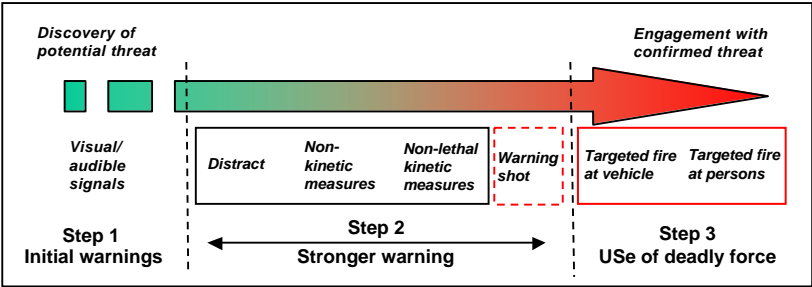
<sup>5</sup> Geneva Convention IV, Article 27(1–3), Additional Protocol I, Article 51, Additional Protocol II, Article 4.

- 12.7 Personnel designated to implement control or security measures, or other measures potentially involving the use of force, against the civilian population, must receive special training. Military police (MP), for example, have special education, training, experience and equipment to perform such tasks. In addition, MPs have extensive experience in exercising police authority in unstable areas, and are specifically trained to prevent the undesirable escalation of a given situation. Military police and similar forces should therefore be involved in such operations, as they will be able to help reduce tensions between military forces and civilians.
- 12.8 In operations where Norwegian military forces are participating in an armed conflict at the request of the host nation, a Status of Forces Agreement (SOFA) will normally be prepared to regulate in detail such issues as jurisdiction and immunity from criminal prosecution. In some cases, such an agreement will also govern the degree of force Norwegian forces may employ against the civilian population. In an international armed conflict in which Norway and the host country are on different sides, however, there will be no need for such an agreement, and none will be prepared.

## **Escalation in the use of force**

- 12.9 Procedures governing escalation of the use of force are designed to ensure that force is employed in accordance with the potential threat faced. If it is clear that persons representing a threat are lawful targets, they may in principle be attacked without prior warning and without escalation in the use of force being required. However, procedures for the escalation of force will be relevant when it is uncertain whether something or someone is a lawful target. Such procedures may also apply in connection with the use of force in self-defence against civilians. Military forces may use force to protect themselves and others against threats, but in doing so must balance the use of force against the threat faced in order to reduce the risk of incidental injury to civilians. In situations where escalation in use of force may be necessary, a sensible and cautious approach is required to control the situation with minimal use of force, thereby protecting and demonstrating respect for the civilian population. The use of force against the civilian population is permissible only to the extent, in terms of intensity and time, that is necessary given the nature of the threat.

12.10 Situational understanding in the area of operations will allow military forces to adapt their tactics, techniques and procedures (TTP) to known threats and the general danger level, so that common procedures can be prescribed for escalating the use of force. The better such procedures are known to the civilian population, the more likely civilians are to act as desired in connection with control or security measures. In addition, military forces will be in a better position to identify potential threats and avert potentially dangerous situations. Escalation procedures that are as uniform as possible across the whole area of operation will therefore help to prevent incidental injury or damage to civilians or civilian objects. The figure below illustrates an ideal escalation procedure. However, forces will not always have time to go through all the stages of such a procedure. Accordingly, a soldier may skip directly to deadly force if he considers the threat to constitute a serious risk to life, health or a vital object and the circumstances indicate that this is the only way of averting the threat.



## Checkpoints

12.11 Checkpoints can be used to control entry to and exit around a combat zone, and to prevent infiltration, espionage and sabotage by enemy forces. Military concerns will also indicate a need to control access to military units and installations in general, including rear areas and areas largely unaffected by the armed conflict.

- 12.12 During armed conflict, force may be used to protect military forces (force protection). When conducting a control assignment at a checkpoint, instructions will therefore be given to persons arriving on foot, in vehicles or in vessels regarding how they should act.<sup>6</sup> Such instructions may be issued by means of verbal challenges, gestures and signals, signs, or the use of physical installations enforcing a particular pattern of movement (such as speed bumps, cement-filled barrels, etc.). Such instructions may prevent someone from being perceived suddenly and unexpectedly as a threat, and will make it easier for checkpoint crews to assess the situation and the threat faced. If persons, vehicles or other craft fail to follow instructions, there will be stronger grounds for assuming that a threat exists. For further discussion of escalation in the use of force, see sections 12.9–10 above.
- 12.13 Depending on the situation, behaviour at a checkpoint may give the checkpoint crew sufficient information to treat threatening persons, vehicles or other craft as lawful targets in accordance with the criteria described in section 3.21 onwards. They will then be permitted to attack these, including with deadly force. In such cases, the use of force does not need to be proportionate to the threat presented, since it is a lawful target. Instead, there is a requirement that no injury or damage should be caused to nearby civilians or civilian objects which is not proportionate to the military advantage anticipated. In other words, if persons presenting a threat are lawful targets, the scope for dealing with the threat will be greater than if such persons cannot be regarded as combatants.

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<sup>6</sup> *Geneva Convention IV*, Article 27(4).





*Afghan soldiers searching a person at a roadblock in Laghman, eastern Afghanistan 2013.  
Photo: EPA/Abdul Mueed/NTB Scanpix*

#### EXAMPLE 1: CHECKPOINT

Military forces should use all available means to warn civilians what is expected of them at a checkpoint. The items below are examples of measures and means which may be used at checkpoints to ensure optimal protection of forces and build a foundation for the best possible situational awareness:

- verbal challenges, gestures, signals or signs explaining that persons should approach at a slow pace
- verbal challenges, gestures, signals or signs explaining where vehicles or vessels should stop
- verbal challenges, gestures, signals or signs explaining how persons in a vehicle or vessel should act
- verbal challenges, gestures, signals or signs explaining the nature of the check
- physical obstacles which force approaching persons, vehicles or vessels to adopt a particular pattern of movement; examples include chevaux de frise, cement-filled barrels, fencing, barbed wire, spike strips, etc.

## EXAMPLE 2: ROADBLOCK SIGNS USED BY ISAF

Examples of signs used to inform drivers approaching roadblocks during the ISAF operation in Afghanistan.



Warning sign



Stop sign

## Civilian riots and civil unrest

- 12.14 In an armed conflict, civilian riots and civil unrest are a major challenge for military forces, even when such riots or unrest have no direct connection with the armed conflict. Among other things, such situations can make it difficult to carry out operations or maintain the security of forces. Accordingly, military forces may be tasked with controlling a crowd for security reasons. Such types of assignments are often described as “crowd control” or “riot control”. The situations most likely to confront Norwegian military forces are demonstrations, for example against the participation of Norwegian forces in an operation or against their presence in the country, and the protection of civilians or property against demonstrators.
- 12.15 Civilian riots and civil unrest will in many cases lack a direct connection with the armed conflict, and will instead be an expression of frustration or dissatisfaction, for example with inadequate access to resources, with the security situation, with large civilian losses, etc. Even violence used against

military forces in connection with a demonstration or riot will often be too little to conclude that persons are participating directly in hostilities and have thus become lawful targets. An example could be a mother, whose child has been killed as a result of combat activity, throwing a firebomb at Norwegian soldiers. In such a situation the Norwegian forces may, nonetheless, use force in self-defence. The conditions and requirements for use of force in self-defence are discussed in sections 14.48–54.

- 12.16 However, a crowd of demonstrators may include people using unrest to direct attacks at Norwegian forces. Persons who can be identified as participating directly in hostilities, for example as members of an armed group or as being involved otherwise in a military attack, will be lawful targets. They may be attacked even if they do not present an imminent deadly threat. For further discussion of direct participation in hostilities, see section 3.21 onwards. Other persons participating in a demonstration will not lose their protected status, however, and must be protected against the effects of hostilities whenever possible. Nonetheless, the right of self-defence remains intact in relation to such persons.
- 12.17 When dealing with violent civilian crowds, deadly force shall not be used until all other measures have been tried without success, or if it is obvious that such measures will not succeed. Before deadly force is used, forces shall, if feasible, give a warning that such means will be used. Thereafter, the crowd must be given time and opportunity to discontinue the actions that make weapons use necessary. The issuance of such a warning will not be necessary in situations where it could result in loss of life or serious injury for soldiers or others, or if it would clearly be pointless under the circumstances.
- 12.18 During armed conflict, the use of chemical weapons is prohibited, with the exception of certain types of riot control agents used in connection with the enforcement of law and order (not as a means or method of warfare). Accordingly, approved types of CS gas and pepper spray may be used in connection with crowd control towards the civilian population. In certain operations, however, this right may be restricted, either by the rules of engagement or by other plans, orders and directives. A legal adviser in the Norwegian Armed Forces should therefore be consulted before Norwegian forces are equipped with CS gas, pepper spray or similar items in an armed conflict. See also section 8.29 on the use of CS gas and similar items during armed conflict.

## Search of civilian property

- 12.19 During an armed conflict, it may be necessary from time to time to search civilian dwellings and other civilian buildings. The reasons for searching civilian property may vary. The most common is a need to verify whether persons or material are present which can be connected to direct participation in hostilities. The search may be focused on persons or material that are essentially civilian in nature, or on combatants who have taken cover in the civilian population. Civilian property may become a lawful target in view of its use; see section 7.2 onwards. The criteria established for when civilian property searches are permitted and the applicable procedures will normally be specified in the rules of engagement and other plans, orders and directives for the relevant operation.



*Soldiers clearing a civilian house. The need to search civilian property may also arise if it is being used for military purposes during an armed conflict. When a property is not a confirmed lawful target, only the degree of force necessary to carry out the search may be used. Photo: Norwegian Armed Forces.*

- 12.20 When searching civilian properties not confirmed as lawful targets, an important basic principle is to proceed as cautiously as circumstances permit. How much care can actually be taken during a search will depend on several factors, including the time available for planning and conducting the search, the available resources and the potential threats faced. If there are likely to be women on the property who will have to be searched, it will in some societies be a major benefit to have female soldiers available to execute any such search.

- 12.21 The permitted invasiveness of a search will depend on the importance of the mission and the potential threat faced. For example, if a house is to be searched because it is suspected that improvised explosive devices are being produced there or that combatants are present, a proportionate measure may be to conduct the search in the middle of the night and gain access to the building through force, for example by kicking in the front door. It may also be necessary and proportionate to control persons in the building by threatening the use of deadly force, for example by carrying arms in a ready position. If a threat assessment indicates no risk of encountering violence, it may be disproportionately invasive to adopt this approach.
- 12.22 Where the threat profile and nature of the mission indicate that forces could knock on the door to see whether anyone is home instead of kicking in the door without warning, this shall be done. If the situation permits, those conducting the search should allow persons living in the dwelling to guide them around the property. However, it is impermissible to use other persons as a shield against potential threats presented by the property. For example, it is impermissible to force a civilian to enter a room first in case there are armed personnel in it, or to force a civilian to open cupboards, boxes, doors, etc. to minimise the risk of personal injury or death through self-detonating explosives or similar devices.
- 12.23 Although forces have a duty not to cause more material damage than necessary to achieve the purpose of a search, they are not obligated to pay compensation for destruction, provided that the search was a lawful act of war. Nevertheless, it is not unusual for military forces to award compensation for damage or destruction caused to physical civilian assets, not least to maintain the best possible relationship with the civilian population. A legal adviser in the Norwegian Armed Forces should be consulted to clarify whether a duty to pay compensation applies.

## Search of persons

- 12.24 During armed conflict, military forces will be permitted to check persons in the area of operations to clarify whether they present a threat to security.<sup>7</sup> It will therefore be permissible to search apparent civilians to check for weapons or documents and other information which may indicate a potential connection with the hostilities, provided that security grounds make this militarily necessary. Persons who following a search are found to fit the criteria of direct participation in hostilities may be interned, but other persons who represent a serious threat to security may also be interned if absolutely necessary on security grounds (see further section 6.86 onwards on the internment of civilians).
- 12.25 Searches of persons shall be carried out in the least intrusive way possible. If a search is conducted in the vicinity of ongoing combat activity, an especially high standard of sensitivity cannot be required, but as much consideration as possible shall be shown given the military situation. In any case, the use of force must always be proportionate to the security threat that is to be averted. Accordingly, no more force shall be used than is necessary to conduct a search safely.
- 12.26 Women and children in particular are to be shown respect, and searches of women should be carried out by female soldiers. Wherever feasible, such searches should not be conducted in front of men or otherwise in a degrading manner. For example, if the circumstances permit, a tent may be erected for such searches.

## Crime prevention

- 12.27 Criminals have civilian status and may not be attacked unless they participate directly in hostilities.<sup>8</sup>
- 12.28 Crime prevention remains a police task during armed conflict; see section 12.1. However, certain exceptions to this rule apply. In an armed conflict it may be necessary to task military forces, either directly or in cooperation with police, with maintaining law and order, or at least with intervening in ongoing criminal offences that endanger lives. In such situations, it is vital to distinguish between the means and methods permitted to be used against persons who are lawful targets in a conflict, and the means and methods permitted to be used against persons who are not lawful targets. The mission could involve training and

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<sup>7</sup> *Geneva Convention IV, Article 27(4).*

<sup>8</sup> *Additional Protocol I, Article 51(3).*

perhaps advising local police or performing actual police tasks. If Norwegian forces were to face such a task, they would normally receive detailed regulations on how to proceed in the form of orders, rules of engagement and standard operating procedures (SOPs).

- 12.29 During an occupation, the occupying power will be obliged to maintain law and order in the occupied area, and will therefore have to perform ordinary police tasks.<sup>9</sup> See further discussion of this topic in section 13.15 onwards. Difficulties which arise in distinguishing such activities from crime prevention and the investigation of possible crimes are discussed further in sections 14.65–69.

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<sup>9</sup> *Convention respecting the Laws and Customs of War on Land of 18 October 1907 (the Land War Regulations)*, Article 43.





# 13

## Occupation

### Introduction

- 13.1 This chapter discusses special topics relevant during occupation, and must be read together with the rest of the manual. A territory is considered occupied when it is actually placed under the authority of the hostile army. It is a military occupation no matter how much resistance is encountered; but if the occupied state has consented to the military forces of the other country taking control of the area in such a way, occupation will not be said to exist. Occupation is considered a form of international armed conflict.<sup>1</sup>

### *Start of occupation*

- 13.2 An area becomes occupied when it becomes subject to the actual authority and control of another state. The term “occupied” applies only to the areas under the effective control of the occupying state – in other words where the previous authorities are no longer able to exercise authority through such measures as law enforcement and collection of taxes and fees. The occupying state must also be in a position to exercise such authority and control.<sup>2</sup> An area will be considered occupied even if the invading forces do not meet armed resistance and there is no combat activity.<sup>3</sup>

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<sup>1</sup> *Geneva Conventions I–IV, common Article 2.*

<sup>2</sup> *Convention respecting the Laws and Customs of War on Land (Hague Convention IV) 1907; Regulations concerning the Laws and Customs of War on Land (the Land War Regulations), Article 42.*

<sup>3</sup> *Geneva Conventions I–IV, common Article 2.*



*Oslo, 9 April 1940. As part of the German invasion of Norway, German forces entered Oslo and marched down Karl Johans gate, past the university. Photo: Photo: Norwegian War Archives/NTB Scampix.*

- 13.3 In order for a state's forces to have effective control of an area, the military forces in the area must have been defeated or forced to flee, and the occupying forces must be in the area long enough to exercise control of the civilian population. Smaller units that withdraw from an area after completing an operation, such as special forces, are therefore not regarded as occupiers. However, an occupation may be in force even if its duration is short, provided that measures are taken to administer the area such that control is in fact exercised.
- 13.4 Military forces do not have to be stationed across all of an occupied area. It is enough that enemy forces are defeated and the civilian population is disarmed; that measures necessary to administer the area have been taken; that the area remains under effective control; and that forces are available if needed. Representatives of the occupying power must be in the area at all times, in the form of either military forces or civilian representatives.
- 13.5 Effective occupation will be regarded as existing even if there are pockets of resistance, provided that such resistance is limited to areas more or less surrounded by the occupying forces.

### *End of occupation*

- 13.6 An occupation may be ended in the following ways:
- i. The occupying power withdraws its forces from the area.
  - ii. The occupying power's forces are defeated or forced to flee by the civilian population in the area, by the occupied state's armed forces, by the armed forces of the occupied state's allies or by a combination of these.
  - iii. The occupying power transfers authority and control to local authorities and the state's sovereignty is re-established.
- 13.7 The authorities of the occupied state may choose to allow foreign forces to remain in the area without this entailing the continuation of occupation. The reason is that an occupation is conditional upon the presence of such forces being unwanted or involuntary. If foreign forces subsequently start to re-exert actual authority and control over an area without the local authorities' consent, the occupation will be considered to have resumed. In many cases, it will be unclear whether foreign forces exercising such authority and control still have the consent of the authorities of the relevant state. See the example in box 1 below.

### *Application of the law of armed conflict*

- 13.8 The rules on international armed conflict apply to situations where a state has occupied all or parts of the territory of another state.<sup>4</sup>
- 13.9 After one year of occupation, the Geneva Conventions will no longer apply in full. Among other things, the occupying power will not have the same responsibility for the care and education of children; nor will it have a duty to import foodstuffs and medicines or to run medical institutions, services and hospitals. Similarly, it will not have to maintain public health and hygiene or to grant religious personnel, such as army chaplains, access to the members of their religious communities for the purpose of providing spiritual assistance. For however long the occupation lasts, however, the occupier will have the same obligations as during the first year of occupation with respect to the maintenance of law and order and respect for the state's laws, although it will no longer be permitted to intern persons solely on the basis of their representing a threat.<sup>5</sup>

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<sup>4</sup> *Geneva Conventions I-IV, common Article 2.*

<sup>5</sup> *Geneva Convention IV, Article 6.*

### *The temporary nature of occupation*

- 13.10 An occupying power is not permitted to annex occupied territory to make it part of the occupying state. Occupation is exclusively a temporary measure, a fact which restricts the occupying power's options to that which is necessary and lawful to achieve the purpose of occupation, maintain law and order and administer the occupied area effectively. Among other things, an occupying power may not deport or transfer members of its own civilian population to the occupied area, or forcibly transfer or deport protected persons from it.<sup>6</sup>

## **Resistance to occupation**

### *Before occupation becomes effective*

- 13.11 The occupation of a country or part of a country will generally be preceded by combat activity. Persons fighting against the advancing occupying power can be divided into two main categories: members of armed forces or resistance movements and civilians participating directly in hostilities. The conditions governing when such persons become lawful targets, and their treatment when captured, are discussed in chapters 3 and 6.

### *During occupation*

- 13.12 As stated above, in order for an occupation to become effective, the country's military forces in the area must be defeated or forced to flee. However, there may be persons or smaller groups which continue to resist occupation. If they qualify as lawful combatants,<sup>7</sup> they will be entitled to prisoner-of-war status (see chapter 6). They will not lose this entitlement even if they gather or attempt to gather information of military value in the occupied territory (i.e. engage in espionage).<sup>8</sup> Persons who resist occupation may be interned even if they do not qualify as lawful combatants, if internment is necessary for imperative reasons of security<sup>9</sup> (see sections 13.20–23 below). If a person who is not entitled to prisoner-of-war status is detained for espionage, that person may be deprived of the right to communicate with the outside world if absolute military security so requires.<sup>10</sup>

## **Administration of occupied areas**

- 13.13 When an occupation begins, the existing authorities are replaced and all their functions cease. The occupying power may nevertheless decide to allow certain

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<sup>6</sup> Geneva Convention IV, Article 49, first and sixth paragraphs.

<sup>7</sup> Geneva Convention III, Article 4(A)(2); Additional Protocol I, Articles 43 and 44; see also chapter 3.

<sup>8</sup> Additional Protocol I, Article 46(3).

<sup>9</sup> Geneva Convention IV, Article 78.

<sup>10</sup> Geneva Convention IV, Article 5, second paragraph; Additional Protocol I, Article 45(3).

civil servants and other public officials to remain in their positions to ease the administration of the country. The occupying power shall not apply sanctions to or take any measures of coercion or discrimination against public officials even if some of them abstain from fulfilling their functions for reasons of conscience.<sup>11</sup> The occupying power has a duty to maintain the organisation of the state and not to make fundamental changes to the existing system. If the existing system is non-functional, the occupying power may replace it with a more effective system that enables the occupying power to administer the country in accordance with the requirements of the law of armed conflict.<sup>12</sup>

- 13.14 An occupying power is not permitted to make changes to the economy and society of an occupied state, although it may assist the population in attempts to improve the economy.

#### EXAMPLE 1: THE OCCUPATION OF IRAQ IN 2003

Following the invasion of Iraq in March 2003, there were several weeks of combat activity before US President George W. Bush declared the end of hostilities on 1 May. Temporary coalition authorities were established which governed Iraq until 28 June 2004, when control of the country was transferred to a temporary Iraqi government. After this, Iraq was again considered a sovereign state, even though it permitted forces of the US-led coalition to remain in the country. Since the former occupying forces remained in Iraq, there has been discussion as to the actual length of occupation.

During occupation, the coalition authorities worked to improve security in the country, in part by training police and military personnel, rebuilding infrastructure, maintaining oil production, improving water and sanitation facilities, improving the availability and quality of housing and education, and facilitating the development of an open economy.

Both the United States and the United Kingdom acknowledged that they were occupying Iraq and that they were bound by, among other things, Geneva Convention IV and the duty to maintain law and order. In addition, the occupying powers were given a mandate by the UN Security Council through Resolution 1483 (22 May 2003) to administer Iraq and establish a temporary Iraqi government.

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<sup>11</sup> *Geneva Convention IV, Article 54, first paragraph.*

<sup>12</sup> *Geneva Convention IV, Article 64, second paragraph.*

## Maintenance of law and order

### *In general*

- 13.15 When an area is occupied, the occupying power has a duty to take all necessary steps to restore, and ensure, as far as possible, public order and safety in the occupied territory.<sup>13</sup> As a main rule, the laws and legal system of the occupied state must continue to apply, although if the existing laws breach fundamental human rights or are inadequate to maintain law and order, the occupying power will be permitted to amend laws to remedy this. The occupying power may also introduce provisions necessary to ensure the safety of the occupying power, the occupying forces or members of the occupying administration as well as their property and the facilities and lines of communication used by them.<sup>14</sup> For example, an occupying power may prohibit the population from carrying arms or holding large political gatherings, or introduce a curfew or controls over mass media. An occupying power may also define acts as criminal sabotage and introduce measures to deal with such acts; see sections 13.20–23 and 13.29–31.

### *The courts*

- 13.16 To ensure effective administration of justice, the courts of an occupied territory shall continue to operate and the penal laws of the occupied territory shall remain in force.<sup>15</sup> The penal code may only be amended or suspended if it represents a threat to the security of the occupying power or an obstacle to the application of the law of armed conflict.<sup>16</sup> Such statutory changes shall not have retroactive effect, and shall not come into force before they have been published and brought to the knowledge of the inhabitants in their own language.<sup>17</sup> In other words, the courts may only apply legal provisions which applicable prior to the offence was committed and which are in accordance with general principles of law. Among other things, they must observe the principle that a penalty must be proportionate to the offence committed.<sup>18</sup>
- 13.17 It is prohibited to alter the status of judges. Judges shall not be subjected to sanctions, measures of coercion or discrimination if they abstain from fulfilling their functions for reasons of conscience.<sup>19</sup> Courts should only be replaced if:
- i. the judges fail to do their job
  - ii. the courts are corrupt or composed in contravention of fundamental legal safeguards, or
  - iii. the local court administration has broken down

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<sup>13</sup> *Land War Regulations, Article 43.*

<sup>14</sup> *Geneva Convention IV, Article 64, second paragraph.*

<sup>15</sup> *Geneva Convention IV, Article 64, first paragraph.*

<sup>16</sup> *Geneva Convention IV, Article 64, first paragraph.*

<sup>17</sup> *Geneva Convention IV, Article 65.*

<sup>18</sup> *Geneva Convention IV, Article 67.*

<sup>19</sup> *Geneva Convention IV, Article 54, first paragraph.*

## *Penalties*

13.18 If an occupying power introduces its own penal provisions and these are breached, the occupying power may hand over persons accused of breaching them to its military courts. This allows the occupying power to enforce provisions even if the local courts are not functioning as they should. Such military courts must be non-political and be established in accordance with the occupying power's ordinary provisions on the establishment of military courts.<sup>20</sup> Courts must therefore be politically independent, both in their establishment and their use, and they are not to function as a political instrument. The use of special courts is prohibited. If Norwegian forces intend to use military courts to enforce penal provisions, the arrangement will have to be coordinated with the Ministry of Justice and Public Security through Norwegian Joint Operational Headquarters and the Norwegian Ministry of Defence. In practice this means that the determination of a local military commander, for example, will be insufficient. In addition, courts must be situated in the occupied country, and courts of appeal should too.<sup>21</sup> Courts may only pronounce judgment following a regular trial, and shall comply with the principles set out below.

- 13.19 The following principles must be followed when penalties are imposed:
- i. New penalties shall not have retroactive effect.
  - ii. The period a protected person has spent under arrest shall be deducted from any term of imprisonment.<sup>22</sup>
  - iii. Courts established by the Norwegian authorities may not impose the death penalty, even if permitted under the laws of the occupied state.<sup>23</sup>
  - iv. Protected persons shall not be arrested, prosecuted or convicted by an occupying power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of war crimes.<sup>24</sup>
  - v. Accused persons shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges against them, and shall be brought to trial as rapidly as possible.<sup>25</sup>

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<sup>20</sup> *Geneva Convention IV, Article 66.*

<sup>21</sup> *Geneva Convention IV, Article 66.*

<sup>22</sup> *Geneva Convention IV, Article 69.*

<sup>23</sup> *Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the Abolition of the Death Penalty in all Circumstances (2002).*

<sup>24</sup> *Geneva Convention IV, Article 70.*

<sup>25</sup> *Geneva Convention IV, Article 71.*

- vi. Accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses. They shall have the right to be assisted by qualified defence counsel of their own choice, who shall be able to visit them freely. If an accused person has no defence counsel, the occupying power shall provide one.<sup>26</sup>
- vii. A convicted person shall have the right of appeal provided for by the laws applied by the court. Where there is no appeal provision, the convicted person shall have the right to petition to the competent authority of the occupying power against the guilty finding and the sentence pronounced.<sup>27</sup>
- viii. Both detention and service of sentence shall occur in the occupied country. Prisoners shall, if possible, be separated from others, and shall enjoy food and hygienic conditions sufficient to keep them in good health. They shall receive medical attention and spiritual guidance. Women shall be confined in separate quarters under the direct supervision of women, and proper regard shall be paid to the special treatment due to minors. Prisoners shall have the right to be visited by delegates of the protecting power or ICRC.<sup>28</sup> The protecting power and ICRC are discussed further in sections 14.76–82.
- ix. Protected persons who have been accused of offences or convicted by the courts in occupied territory shall be handed over to the authorities of the liberated territory at the end of occupation, along with the relevant case records.<sup>29</sup>

### *Resistance to the occupying power*

- 13.20 Where civilians in an area being invaded take up arms without having had time to organise themselves or procure fixed distinctive signs, they shall nevertheless be regarded as lawful combatants. In other words, they may engage in lawful acts of war without being subject to criminal prosecution, and are entitled to prisoner-of-war status if captured.<sup>30</sup> See section 3.20 for more information on such spontaneous resistance (*levée en masse*).
- 13.21 Once an area has been occupied by another state, any armed resistance to occupation must comply with the rules on prisoner-of-war status in chapter 6 in order for those engaging in such resistance to be entitled to prisoner-of-war status upon capture. The general civilian population, on the other hand, will not be entitled under international law to use force to remove the occupying

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<sup>26</sup> Geneva Convention IV, Article 72.

<sup>27</sup> Geneva Convention IV, Article 73.

<sup>28</sup> Geneva Convention IV, Article 76.

<sup>29</sup> Geneva Convention IV, Article 77.

<sup>30</sup> Geneva Convention III, Article 4(A)(6).



power. Active resistance to the occupying power, for example in the form of acts of sabotage, may therefore be criminally prosecuted in accordance with applicable laws, including any special laws introduced by the occupying power; see section 13.15 above. Examples of sabotage include destroying the occupying power's buildings or equipment, blowing holes in oil pipelines and damaging lines of communication such as bridges and railway lines.

#### EXAMPLE 2: LAW AND JUSTICE DURING THE GERMAN OCCUPATION OF NORWAY

After Germany's invasion of Norway on 9 April 1940, an administrative council was established to govern Norway. The members of the council gave an oath of loyalty to the German Reich. On 24 April 1940, the German authorities published a regulation (Erlass 3), which among other things declared that occupied Norwegian areas were subject to the German Reichskommissar and stated that, "Existing law will remain in force to the extent that it is consistent with the occupation." During the occupation, several new laws were introduced, including several seen as more extensive than is permitted under international law. The occupying power sought among other things to introduce Nazi ideology into churches, education and sports.

The German occupying power used the police and judicial system as instruments of the occupation. As a result, the members of the Supreme Court resigned in protest on 21 December 1940, to avoid legitimising the occupying power's use of force.

Norway remained under German occupation until its liberation on 8 May 1945. The government, judiciary and police were largely composed of Norwegians, although the majority of these officials were also members of the Norwegian fascist party Nasjonal Samling and had given an oath of loyalty to the occupying power.

- 13.22 An occupying power may not require the civilian population in occupied territory to be loyal to the occupying power. For example, it may not require civilians to report persons they know to be planning acts of sabotage. However, an occupying power has wide authority to intern persons who engage in active resistance to occupation. If protected persons, primarily meaning civilians, commit less serious offences with the sole intention of harming the occupying power, they may be placed in internment facilities or in ordinary prison. Such offences are those not constituting an attempt on life or

limb of a member of the occupying power's forces or administration. They may also be offences which do not represent a serious collective threat and offences which do not cause serious damage to property belonging to the occupying forces or the occupying power's administration or facilities used by them. Such internment has the purpose of preventing recurrence, and may be applied in cases of no serious consequence to the occupying power. The duration of internment or imprisonment must be proportionate to the offence committed. Alternative sanctions such as fines may also be considered.<sup>31</sup> Persons suspected of having committed more serious offences, and who are to be punished for these, must be given an opportunity to have the case tried by a court (see sections 13.18–19).

- 13.23 An occupying power is also permitted to intern persons if considered necessary for imperative reasons of security, even if such persons have not violated any applicable laws.<sup>32</sup> The conditions and requirements associated with internment, including the right to appeal and right to regular review of the grounds for internment, are discussed in section 6.86 onwards.

## Taxes and fees

- 13.24 If an occupying power collects taxes and fees in the occupied area, this must, as far as possible, be done in accordance with existing laws and regulations. Expenses linked to the administration of the occupied area shall be funded in the same way as under the former government of the occupied state.<sup>33</sup> Other taxes and fees shall only be collected if required to meet needs of the armed forces or of the administration of the occupied area which are not covered in other ways.<sup>34</sup> Such collection shall only occur under written orders from the responsible authorities, and receipts shall be issued for payments.<sup>35</sup>
- 13.25 The economy of a state in an occupied territory can only be expected to cover those expenses of the occupying power that are directly linked to the occupation, and only to the extent the economy can be expected to have the necessary capacity to do so.

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<sup>31</sup> *Geneva Convention IV, Article 68.*

<sup>32</sup> *Geneva Convention IV, Article 78.*

<sup>33</sup> *Land War Regulations, Article 48.*

<sup>34</sup> *Land War Regulations, Article 49.*

<sup>35</sup> *Land War Regulations, Article 51.*

- 13.26 Collected funds may not be used to enrich the occupying power or individuals, and shall not be used as a means of collective punishment. Read more about the distinction between trophies of war and war booty in sections 9.13–17.

## The civilian population in occupied territory

### *In general*

- 13.27 The protection of the civilian population and other protected persons during armed conflict is discussed in chapter 4. Among other things, protected persons are entitled to be treated humanely and with respect. They shall be protected against violence and threats. Women shall be especially protected against attacks on their honour in the form of, for example, degrading punishments or work, and shall be specifically protected against rape, enforced prostitution and any form of indecent assault. Protection shall be provided without adverse distinction based, in particular, on race, religion or political opinion.<sup>36</sup>
- 13.28 In addition to the protection of civilians in armed conflict generally, there are various specific rules on the protection of civilians in occupied areas. The reason is that such persons are under the control of another state, and therefore at risk of abuse of power. Civilians in occupied territory are entitled to such protection until the occupation in fact ends, regardless of any agreements reached between the institutions or authorities of the country and the occupying power.<sup>37</sup> Nor may individuals renounce these rights in part or in entirety.<sup>38</sup> The most relevant of these rules are presented in this chapter; see sections 13.27–42 in particular.

### *Use of force against inhabitants of occupied areas*

- 13.29 An occupying power has a duty to maintain law and order in the occupied territory, and may also implement such measures as it considers necessary to protect its own forces and carry out the occupation; see for example sections 13.18–19 and 13.20–23. On the other hand, the occupying power is bound by several specific restrictions on the actions of an occupier, as well as by the general rules on the use of force in armed conflict.
- 13.30 The following are prohibited:
- forcing the inhabitants of an occupied territory to furnish information about the armed forces or means of defence of the country<sup>39</sup>

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<sup>36</sup> *Geneva Convention IV, Article 27.*

<sup>37</sup> *Geneva Convention IV, Article 47.*

<sup>38</sup> *Geneva Convention IV, Article 8.*

<sup>39</sup> *Land War Regulations, Article 44.*

- forcing the inhabitants of an occupied territory to swear allegiance to the occupying power<sup>40</sup>
- forcing protected persons to serve in the occupying power's armed or auxiliary forces and using pressure or propaganda to secure voluntary enlistment<sup>41</sup>
- punishing, economically or otherwise, the civilian population in general for acts committed by individuals for which they cannot be regarded as jointly and severally responsible.<sup>42</sup>
- forcibly transferring or deporting protected persons or groups of protected persons from the occupied area<sup>43</sup>
- detaining protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.<sup>44</sup>

13.31 The inhabitants of a specific occupied territory may nevertheless be evacuated if the security of the population or imperative military reasons so demand. Such evacuation shall if possible take place within the occupied area, and persons shall be returned to their homes as soon as hostilities in the area have ceased. The evacuation itself shall take place under suitable conditions, and consideration shall be given to safety, cleanliness, hygiene and food supplies, and to seeing that members of the same family are not separated. As soon as such an evacuation or transfer has taken place, the protecting power or ICRC must be informed.<sup>45</sup> Factors that may qualify as permissible grounds for evacuation or forcible relocation are discussed in sections 9.38–39.

### *Access to food, medicines and medical services*

13.32 An occupying power has a duty to take all feasible precautions to ensure that the population of an occupied territory has adequate access to food and medicines, and shall permit the ICRC or any protecting power to investigate whether sufficient food and medicines are available in the occupied area. If the occupied area's own supplies are insufficient, the occupier shall import food, medicines and all other necessary items. Further, the occupying power shall not requisition food, products or medicines in an occupied territory, except for

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<sup>40</sup> *Land War Regulations, Article 45.*

<sup>41</sup> *Geneva Convention IV, Article 51, first paragraph.*

<sup>42</sup> *Land War Regulations, Article 50.*

<sup>43</sup> *Geneva Convention IV, Article 49, first paragraph.*

<sup>44</sup> *Geneva Convention IV, Article 49, fifth paragraph.*

<sup>45</sup> *Geneva Convention IV, Article 49, second to fourth paragraphs.*

the purpose of supplying the occupying power's forces and administrative personnel and not, for example, with the aim of selling them. If an occupying power requisitions food, products or medicines, consideration must be given to the needs of the civilian population, and reasonable compensation must be paid for what is taken.<sup>46</sup>

- 13.33 The definition of reasonable compensation will vary from operation to operation. In many instances, set rates will have been established for such compensation. If no such rates have been established, a discretionary assessment is required of what is reasonable. Normally, current prices in general use will provide a good starting point for this assessment, although prices may be abnormally high in a conflict situation. In the case of a prolonged occupation, prices may normalise again so that market prices may provide a realistic starting point. The force commander of a given operation will issue guidance on who should conduct this assessment and how it should be conducted.
- 13.34 Hospitals, medical institutions and medical services shall be protected. In cooperation with national and local authorities, the occupying power shall use all available means to keep them operating and to maintain public health and hygiene, including through necessary preventive measures. Health personnel shall be allowed to carry out their duties.<sup>47</sup> If the occupying power has to requisition civilian hospitals to care for wounded and sick military personnel on the grounds of urgent necessity, this may only be done temporarily, and necessary steps must be taken to ensure that the needs of the civilian population are met. Medical equipment belonging to civilian hospitals cannot be requisitioned so long as they are necessary for the needs of the civilian population.<sup>48</sup>

### *Humanitarian assistance*

- 13.35 If the population of an occupied territory lacks necessary supplies, particularly of food, medicines and clothing, the occupying power shall permit relief measures for the population, and facilitate the distribution of supplies. Such measures may be initiated by other states or, for example, the ICRC. All states, including the occupying power, shall grant safe conduct to relief consignments, although a state which permits such relief consignments to proceed to an area occupied by the enemy is entitled to search the consignments and determine delivery times and routes.<sup>49</sup> Such relief consignments do not relieve the

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<sup>46</sup> *Land War Regulations, Article 52; Geneva Convention IV, Article 55.*

<sup>47</sup> *Geneva Convention IV, Article 56, first paragraph.*

<sup>48</sup> *Geneva Convention IV, Article 57.*

<sup>49</sup> *Geneva Convention IV, Articles 59 and 61.*

occupying power of its duties, and the occupying power shall in no way divert relief consignments from the purpose of which they are intended, except in cases of urgent necessity. Even then, this is only permitted if the alternative use benefits the population of the occupied territory rather than the forces, administration or civilians of the occupying power present in the occupied territory.<sup>50</sup> Examples of such urgent necessity include an effort to prevent an epidemic from spreading or the destruction of supply route that makes it impossible to transport supplies to the intended recipients.

- 13.36 Protected persons in occupied territory shall be permitted to receive individual relief consignments addressed to them unless otherwise indicated by imperative security grounds.<sup>51</sup>

### *Care for and education of children*

- 13.37 An occupying power shall take all necessary steps to facilitate the identification of children and registration of their parentage if these are unclear. Further, the occupying power must cooperate with national and local authorities to facilitate the operation of schools, day-care facilities, orphanages and similar institutions. If local institutions are unable to care for orphaned children or children separated from their parents by war, the occupying power shall arrange for their support and education, preferably with the assistance of persons of the children's own nationality, language and religion, if there are no near relatives or friends capable of doing so. In addition, the occupying power shall not impede existing systems designed to provide children under the age of 15, pregnant women, and mothers with children under the age of seven with necessary food, medical care and protection from the effects of war.<sup>52</sup>

### *Work and requisitioning of services*

- 13.38 As stated in section 13.30, an occupying power is not permitted to force protected persons to serve in its armed or auxiliary forces. Nor may it attempt to create unemployment or restrict employment opportunities for workers in an occupied territory in order to induce them to work for the occupying power,<sup>53</sup> for example by closing factories or limiting production through restricted access to raw materials. However, this prohibition does not affect the occupying power's right to restrict activities deemed harmful to the security of the occupying power or its ability to implement the occupation.

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<sup>50</sup> *Geneva Convention IV, Article 60.*

<sup>51</sup> *Geneva Convention IV, Article 62.*

<sup>52</sup> *Geneva Convention IV, Article 50.*

<sup>53</sup> *Geneva Convention IV, Article 52, second paragraph.*

- 13.39 Nor is an occupying power permitted to alter the status of public officials or in any way apply sanctions to or take any measures of coercion or discrimination against them, should they abstain from fulfilling their functions for reasons of conscience.<sup>54</sup> This includes judges; see sections 13.16–17. In other words, patriotic refusal to work cannot be penalised by means of fines or imprisonment, although persons who refuse to work may risk losing their job.
- 13.40 An occupying power may nevertheless put people to work that is needed to meet the needs of the occupying forces or the public administration, or to secure food supplies, housing quarters, clothing, transportation or the health of the population in the occupied territory. Persons forced to perform this type of work must be over the age of 18. The work must be performed in the occupied area in which the persons are staying, and may not involve participation in military operations or support for military or paramilitary organisations. Whenever possible, such persons shall be permitted to remain at their ordinary place of work. The work shall be reasonably remunerated and be proportionate to the physical and intellectual capacities of the workers. The occupying power shall respect the laws of the occupied country relating to working conditions and safeguards.<sup>55</sup> For example, national law may contain provisions on the length of the working day and the risks to which workers may be exposed.
- 13.41 An occupying power is also permitted to requisition services if required for the occupying power's forces and administrative personnel. Such services may include food and accommodation, care for the sick and wounded, and repair of equipment. Account shall always be taken of civilian needs, and reasonable compensation shall be paid for requisitioned services, primarily in the form of cash payment.<sup>56</sup> As stated in section 13.33, compensation must be paid on the basis of either set rates or a discretionary assessment that takes into account the prevalent rates of the day.

### *Practice of religion*

- 13.42 An occupying power shall permit religious personnel, such as army chaplains, to give spiritual guidance to the members of their religious communities. Further, the occupying power shall accept consignments of books and articles

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<sup>54</sup> *Geneva Convention IV, Article 54, first paragraph.*

<sup>55</sup> *Geneva Convention IV, Article 51.*

<sup>56</sup> *Land War Regulations, Article 52.*

required for religious needs and facilitate their distribution in occupied territory.<sup>57</sup>

## Enemy property in occupied territory

- 13.43 Any destruction of real or personal property, belonging to private persons or the state or other public authorities is prohibited, except where such destruction is rendered absolutely necessary by military operations.<sup>58</sup> For example, military considerations may indicate that it is absolutely necessary to destroy a bridge or certain vehicles to stop a planned attack on the occupying forces, or it may be necessary to destroy buildings which surround military headquarters and are making it difficult to defend the forces. Such destruction must always be proportionate to the military advantage expected to be gained.
- 13.44 The rules for seizing and requisitioning objects and property vary depending on whether such objects or property are privately or publicly owned, and will therefore be discussed separately.

### *Private property*

- 13.45 Property and movables (objects) are private if they belong to private persons or companies. In addition, the property of municipalities and buildings dedicated to religion, charity, education, the arts and science are also regarded as private property even if owned by the state. Such buildings, historic monuments, works of art and science may not be seized, destroyed or wilfully damaged.<sup>59</sup>

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<sup>57</sup> *Geneva Convention IV, Article 58.*

<sup>58</sup> *Geneva Convention IV, Article 53.*

<sup>59</sup> *Land War Regulations, Article 56.*





*Port of Oslo, 1940. The ship in the foreground is the MY Stella Polaris, a renowned cruise ship constructed for Det Bergenske Dampskibsselskab (BDS). The Germans requisitioned the ship as accommodation for German soldiers. In the background, to the right, is the Goya, a Norwegian cargo ship used to transport German refugees. It was sunk by a Russian submarine on 16 April 1945 en route from Danzig Bay to western Germany, resulting in the loss of 7,000 lives. Photo: Ingvald Møllerstad/ Aftenposten/NTB Scanpix.*

- 13.46 An occupying power also has a duty to prohibit and prevent the illicit export and other removal of cultural property, as well as transfer of ownership of cultural property. The occupying power shall also prohibit and prevent all archaeological excavations which are not strictly required to safeguard, record or preserve cultural monuments or property, and all changes in the use of such cultural materials with the purpose of concealing or destroying cultural, historical or scientific evidence. Any excavations or changes in the use of cultural property should, unless circumstances do not permit, be made in cooperation with competent national authorities of the occupied state.<sup>60</sup>
- 13.47 Private property and objects shall never be subject to pillage.<sup>61</sup>

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<sup>60</sup> *Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Article 9.*

<sup>61</sup> *Land War Regulations, Article 47.*

## Property and buildings

- 13.48 An occupying power is not permitted to confiscate private real property on a permanent basis.<sup>62</sup> Nevertheless, private real property may be used temporarily if necessary to meet the needs of the occupier, even if such use may reduce the value of a property or building. Examples of needs which may be met in this way include providing accommodation for occupying forces, treating sick and injured persons, establishing defensive positions, and using a property as an observation post or cover against attack. If absolutely necessary for the defence of an area, an occupying power may remove buildings, fences and trees obstructing the line of sight, or use such materials to construct roads and bridges, or as fuel.
- 13.49 The owner of a private property or buildings used by an occupying power is not formally entitled to compensation, although it is common practice to pay compensation for use and resulting damage. It is important to distinguish between the use of objects and services. If an owner is required to care for forces or sick or injured persons, services will be involved and the owner will then be entitled to compensation; see sections 13.50–52. In some cases, an owner may claim compensation for damage to property or buildings after a conflict has ended. To facilitate such financial post-conflict settlements, all property which is used should be registered, and owners should be provided with some form of invoice recording use and any damage.

## Objects, goods and services

- 13.50 An occupying power is generally not entitled to confiscate privately owned movables (objects).<sup>63</sup> An occupying power is only permitted to take possession of the following:
- devices, whether on land, at sea or in the air, suitable for communication of news
  - means of transport, whether on land, at sea or in the air, suited to the transportation of persons or objects
  - private weapons and war material
- 13.51 Objects taken possession of must be returned after the end of the conflict, and compensation must be agreed for any loss, damage or destruction.<sup>64</sup>

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<sup>62</sup> *Land War Regulations, Article 46.*

<sup>63</sup> *Land War Regulations, Article 46.*

<sup>64</sup> *Land War Regulations, Article 53.*

- 13.52 An occupying power is also permitted to requisition goods for use by the occupying power's forces and administrative personnel, such as food, medicines, fuel, materials and uniforms. Account must always be taken of the needs of civilians, and reasonable compensation shall be paid for goods which are requisitioned, primarily in the form of cash payment. Alternatively, an invoice must be provided and the amount owed be paid as quickly as possible.<sup>65</sup> For further discussion of the rights of civilians, see sections 13.32–34

### *Public property*

- 13.53 In addition to being permitted to collect and use taxes (see sections 13.24–26), an occupying power may take possession of cash and securities owned by the state. The occupying power may also take possession of weapons and equipment stocks, ammunition, means of transport, fuel, means and systems of communication and generally all state-owned objects which may be used for military operations.<sup>66</sup>
- 13.54 As regards property belonging to the state, such as armed forces facilities, barracks and military airfields, the occupying power shall only be regarded as an administrator with the right to use these objects. This applies to public buildings, properties, forests and agricultural areas belonging to the occupied state and persons in it. In other words, the occupying power does not become the owner of seized property, but it is permitted to use it during the period of occupation. Nevertheless, objects and property shall not be used in a manner that destroys them or reduces their value.<sup>67</sup> For example, an occupying power will be permitted to rent out or use public buildings, sell crops, cut and sell timber and run mining operations, provided that such exploitation falls within the scope of normal activities. In addition, no agreements may be concluded which remain in force post-occupation. Among other things, this means that no agreements may be concluded with civilian contractors which grant them rights to continue their operations after occupation. If civilian contractors have concluded agreements with an occupying power, they must conclude new agreements with the new authorities after the end of occupation in order to continue their operations.

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<sup>65</sup> *Land War Regulations, Article 52.*

<sup>66</sup> *Land War Regulations, Article 53.*

<sup>67</sup> *Land War Regulations, Article 55.*

### EXAMPLE 3: CONFISCATION AND REQUISITIONING OF PRIVATE PROPERTY DURING THE GERMAN OCCUPATION OF NORWAY

In the summer of 1941, the German occupying authorities in Norway decided that radios should be confiscated. Only members of the Norwegian fascist party Nasjonal Samling were permitted to own a radio. This was done to prevent Norwegians from listening to transmissions from London containing information about the efforts of the Allies and messages from the Norwegian authorities in London.

Among other things, the occupying power requisitioned buildings and land areas for its own use. Various municipal buildings, including school buildings, were taken over for use as quarters for German forces. Private property was also requisitioned. For example, on 9 April 1940, German forces requisitioned private cars to pursue the Norwegian King and the government to Hamar, and several larger villas were requisitioned for the families of German officers. It was not always clear to what extent such requisitioning could be justified by the needs of the occupying forces or the administration.

## National information bureau

- 13.55 An occupying power is required to establish an official information bureau tasked with receiving and forwarding information about protected persons in its power, i.e. persons detained for more than two weeks, placed in assigned residence or interned. The office shall send information to the home state of such persons, either directly or through a central office run by the ICRC or a protecting power, and reply to questions sent to the office about protected persons. Although international law specifies two weeks, national information bureaus may choose to apply a shorter period. The information shall allow the precise identification of the protected person and rapid notification of his family.<sup>68</sup>

National information bureaus are discussed in greater detail in section 4.75 onwards on protected persons.

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<sup>68</sup> *Geneva Convention IV, Articles 136–141.*

# 14

## Observing and enforcing the law of armed conflict

### Introduction

- 14.1 Norway and Norwegian forces have a duty to comply with both Norwegian law and international treaties by which Norway is bound. These include the Geneva Conventions with additional protocols, the Hague Conventions, various weapons conventions and the Rome Statute of the International Criminal Court. Norway is also bound by applicable customary international law, and required to enforce the law of armed conflict by investigating possible violations and prosecuting these through disciplinary or penal measures.<sup>1</sup>

### Reciprocity

- 14.2 The purpose of the law of armed conflict is to reduce unnecessary injury and suffering in armed conflict, among both combatants and persons who are not participating in hostilities. The rules continue to apply even if smaller or greater violations occur. This means that breaches of the rules by one party to an armed conflict will not justify breach of the rules by another party. Even if the law of armed conflict is generally respected by armed forces, there may be situations in which the enemy does not comply with it. This may give the enemy an advantage in warfare and be a source of frustration. For example, the enemy may fail to comply with the principle of distinction by not distinguishing itself from the civilian population. Norwegian forces must nevertheless abide by the rules, whether in an international or non-international armed conflict.<sup>2</sup>

### Knowledge and training requirements

- 14.3 In order to ensure respect for the law of armed conflict, one of the obligations under the Geneva Conventions is to disseminate knowledge of the law of armed conflict and to teach military forces on the content of the conventions, during both peacetime and armed conflict. Military commanders at all levels must therefore take all possible steps to ensure that the law of armed conflict is

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<sup>1</sup> *Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146; Additional Protocol I, Articles 85–87.*

<sup>2</sup> *Geneva Conventions I–IV, common Articles 2 and 3.*

a natural and integrated element in day-to-day training and exercises. Personnel with responsibility for activities that are regulated by special provisions of the law of armed conflict must receive specific training. This applies, for example, to personnel responsible for prisoner services or internment, persons running medical services and individuals working with targeting.<sup>3</sup> Persons who will be participating in an operation to which the law of armed conflict will apply must refresh their knowledge of the law before deployment. Teaching and training should focus on the particular operation and the potential issues that may arise. This manual is designed to make treaty rules and rules based on customary international law more accessible. The manual will therefore be a helpful tool for Norwegian forces that need to identify relevant rules quickly.

## Legal advice

- 14.4 Under the Geneva Conventions, Norway is obliged to ensure that legal advisers are available to advise military commanders on the application of the law of armed conflict and on the training that should be given to forces in the law of armed conflict. This obligation applies both in peacetime and while participating in an armed conflict.<sup>4</sup> Which ranks of military commanders should receive advice from a legal adviser will depend on the situation and the mission.
- 14.5 For lawyers to give good advice during armed conflict, it is crucial that they are familiar with military systems and operations as well as the application of the law of armed conflict. Since providing legal advice to a military commander during armed conflict is a combatant function in most cases, lawyers must also have sufficient training in military skills.

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<sup>3</sup> *Geneva Convention I, Article 47; Geneva Convention, Article 48; Geneva Convention III, Article 127; Geneva Convention IV, Article 144; Additional Protocol I, Article 83; Additional Protocol II, Article 19; CCW, Article 6.*

<sup>4</sup> *Additional Protocol I, Article 82.*

## Consequences of breaches of the law of armed conflict

- 14.6 Breaches of the law of armed conflict may trigger disciplinary or criminal responsibility. Under criminal law, breaches of the law of armed conflict can be divided into two categories: grave breaches and other breaches. Grave breaches of the law of armed conflict constitute war crimes; see sections 14.58–64 below. Other breaches committed by Norwegian forces will be subject to penalties under the Military Penal Code<sup>5</sup> (see section 14.57), or in relevant cases result in disciplinary penalties under the Military Disciplinary Code<sup>6</sup> (see sections 14.20–25).
- 14.7 Persons who breach the law of armed conflict may also lose rights granted under these rules. For example, members of the armed forces of a state who engage in information-gathering behind enemy lines out of uniform lose their entitlement to prisoner-of-war status if captured<sup>7</sup> (see sections 9.46–49).
- 14.8 In the case of lawful combatants, breach of the rules of the law of armed conflict will normally not deprive them of their entitlement to lawful-combatant or prisoner-of-war status.<sup>8</sup> However, they may be punished for violations if their actions do not constitute lawful acts of war. Lawful-combatant status may be lost if a person no longer satisfies the applicable conditions. Soldiers who participate in an attack without distinguishing themselves from civilians through the wearing of a uniform or similar means may thus lose their status as lawful combatants. That means soldiers may be penalised for actions that breach national law. In addition, they will no longer be entitled to prisoner-of-war status. Requirements regarding the wearing of uniforms and exceptions from these requirements are discussed in greater detail in sections 6.15–17.
- 14.9 If rules of the law of armed conflict are breached by protected persons who are entitled to the same treatment as prisoners of war, such as medical and religious personnel (for example army chaplains), they will not lose their right to such treatment as a result. This would, however, be the case if members of the Norwegian Armed Forces Joint Medical Service were used for non-medical tasks, such as manning unit weaponry. Since actions inconsistent with the law of armed conflict will not be lawful acts of war, personnel may be penalised for any breaches of national law. In addition, any use of force may amount to

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<sup>5</sup> *Military Penal Code of 22 May 1902 No. 13.*

<sup>6</sup> *Act relating to military disciplinary authority of 20 May 1988 No. 32 (the Military Disciplinary Code).*

<sup>7</sup> *Additional Protocol I, Article 46.*

<sup>8</sup> *Additional Protocol I, Article 44(2).*

direct participation in hostilities, making the person in question a lawful target. In some cases, such actions may also entail perfidy or the misuse of emblems (see sections 9.23–28).

## Duty of commanders

- 14.10 Military commanders have a responsibility to ensure that forces under their command and control are familiar with their obligations under the law of armed conflict. This responsibility has been given to them for the purpose of preventing and repressing breaches of the rules.<sup>9</sup>
- 14.11 Military commanders also have a responsibility not to issue orders to commit criminal acts. Issuing such orders may amount to gross negligence in the performance of official duties.<sup>10</sup> The person who issues the order may be held liable under criminal law for acts done as a result of the order, since issuing the order constitutes participation in the offence.<sup>11</sup>
- 14.12 All military commanders and civilian leaders or persons effectively acting as such who are aware that subordinates or other persons under their control are about to commit or have committed a criminal offence must take necessary measures to prevent such breaches of law. Where such acts have already been committed, the military commander must implement disciplinary or penal action against the relevant persons. This duty applies to both breaches of the law of armed conflict<sup>12</sup> and other criminal offences under Norwegian law.<sup>13</sup> See sections 14.28–30 for further information on the criminal responsibility of Norwegian forces. In some cases, a military commander may also be held liable, and thus be penalised, for offences committed by a subordinate. These are cases where the military commander knew or should have known that a subordinate was committing or about to commit a crime and failed to take all feasible measures to prevent it.<sup>14</sup> For example, if a military commander hears rumours that some of his subordinates are engaging in brutality towards the civilian population, he will have a duty to investigate what has happened and take any necessary steps against the persons in question. If he fails to do so and the same soldiers subsequently kill civilians, he may be held criminally liable according to the doctrine of command responsibility.

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<sup>9</sup> *Additional Protocol I, Article 87(2).*

<sup>10</sup> *Military Penal Code, section 78.*

<sup>11</sup> *Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146; ICC, Article 25.3.b; General Civil Penal Code (2005), section 15.*

<sup>12</sup> *Additional Protocol I, Article 87(3).*

<sup>13</sup> *Military Penal Code, section 65.*

<sup>14</sup> *Additional Protocol I, Article 86; Military Penal Code, section 65; General Civil Penal Code (2005), section 109.*



- 14.13 A superior's duty to prevent or prosecute breaches of the law of armed conflict and Norwegian criminal law obligates him or her to ensure that an investigation is launched and conducted to clarify what has happened in any case where there is suspicion of such a criminal offence. Generally speaking, suspected violations of the General Civil Penal Code must be investigated by civilian police under the leadership of the civilian prosecuting authority. However, in less serious cases and cases involving only possible violations of the Military Penal Code, the investigation will in practice be conducted by the military police unless otherwise decided by the prosecuting authority. In the latter type of cases, the relevant military commander is responsible for ensuring that the military police investigate.
- 14.14 If a military commander has no genuine opportunity to prevent the crimes or to implement disciplinary or penal actions against the relevant persons, he cannot be held liable under the doctrine of command responsibility. However, the threshold for concluding that a military commander had no opportunity to stop or prevent crimes is very high. The military commander must have lost both control and his actual ability to influence his own forces, or must be able to demonstrate that he neither knew nor had any opportunity to know of the offence. For example, a commander may not be held liable for the actions of soldiers who massacre civilians without warning or prior indication.

## Individual responsibility

- 14.15 Individuals are responsible for their own actions, and may be penalised for breaches of Norwegian law, including war crimes. Attempts to commit and participation in such actions are also punishable. Criminal responsibility is discussed in greater detail in section 14.26 onwards.
- 14.16 Professional soldiers, conscripts and persons on temporary service with the Norwegian Armed Forces (armed forces personnel) have a duty to obey orders given by their superiors, i.e. superiors empowered to give them orders.<sup>15</sup> In principle, due to this duty to obey, subordinates may not be punished for actions they have been ordered to perform. However, orders do not exempt a person from punishment if their actions exceed the scope of the orders. Those who execute orders will also be held personally responsible if they knew or clearly should have known that carrying out the order would amount to an unlawful act.<sup>16</sup> In other words, the plea of superior orders may only be invoked successfully as a ground for excluding criminal responsibility if the person carrying out the orders did not know them to be unlawful and that they were

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<sup>15</sup> *Military Penal Code, sections 6 and 46.*

<sup>16</sup> *Military Penal Code, section 24.*

not manifestly unlawful. A person carrying out orders will therefore be criminally liable if he understood the orders to be unlawful or should have understood them to be so. In cases where it is unclear whether or not an order is unlawful and the person receiving the order is unable to assess its legality, the general duty to obey orders applies (see examples of such cases below). In such situations, the person issuing the order will be held responsible for its lawfulness.

#### EXAMPLE 1: DUTY TO OBEY ORDERS WHEN ORDERS ARE UNLAWFUL

In most cases, having received an order to violate the law of armed conflict will not exempt someone from criminal punishment, because the execution of most such orders must be regarded as manifestly unlawful. Examples may include orders to abuse prisoners, to attack civilians who are not participating directly in hostilities or to use anti-personnel mines. Such orders shall not be obeyed, and will therefore not constitute grounds for exemption from criminal responsibility.

On the other hand, orders which are not manifestly unlawful shall be obeyed. For example, a unit assigned to execute part of a larger attack will not be able to question the proportionality assessment for the attack unless circumstances change or are not as assumed. This may be the case for a team tasked with helping destroy an enemy command and control system. The team will be obliged to follow the order to conduct a pre-planned attack on a radio tower even if the team is not in a position to see how the expected military advantage of destroying the tower outweighs potential civilian losses that the attack is expected to cause.

Another example is the duty to obey orders to intern civilians on imperative security grounds. If the person carrying out the internment has no insight into the grounds for internment, he usually will not be in a position to question the assessment as to whether internment is necessary, and must therefore follow the order.

- 14.17 If an order is given not to use force beyond self-defence, but armed force is nevertheless used against a person who is a lawful target, the use of force will constitute a breach of orders but not a violation of the law of armed conflict. This assumes, of course, that the attack is conducted in accordance with the law of armed conflict.

## Distinction between individual responsibility and state responsibility

- 14.18 As described above, individuals are responsible for their own actions and, in some cases, acts committed by persons under their command. In addition to such individual criminal responsibility, Norway as a state will be held liable for acts committed by Norwegian forces. If members of Norwegian forces carry out lawful acts of war under orders issued by the Norwegian authorities, Norway will be held responsible for these actions, not the individuals who have taken them. This is because armed forces represent the state, and it is therefore the state rather than its soldiers that must be held politically accountable for lawful acts of war. Norway will also be held responsible if Norwegian forces commit unlawful acts of war. In such cases, state responsibility will apply in addition to the responsibility of the individuals involved.
- 14.19 This chapter focuses on the responsibility of members of the Norwegian Armed forces and what happens if they neglect their responsibility. The general responsibility of states will not be discussed, although two types of cases where state and personal responsibility meet – reprisals and reparation – are briefly discussed in sections 14.70–74.

## Disciplinary sanctions

- 14.20 Disciplinary action may be taken in response to breach or neglect of official military duties or standards of military order and conduct. Official duties must be based on legislation, rules, instructions, directives, regulations or lawful orders, and includes any general rules or special orders relating to military service. A lawful order is any order given by a superior that relates to military service and does not entail the commission of an unlawful act; see sections 14.16–17.<sup>17</sup>
- 14.21 Disciplinary action may also be taken against a person who is guilty of actions punishable under Norwegian criminal law, if done in a military area, towards military personnel or towards or by the use of military vehicles.<sup>18</sup> Norwegian criminal law encompasses the General Civil Penal Code and criminal provisions in special legislation, such as the Road Traffic Act and Medicines Act. In such cases, disciplinary action may be appropriate if the criminal law violation in question is less serious. Disciplinary action may be taken for both intentional and negligent acts.

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<sup>17</sup> *Military Disciplinary Code, section 1; see also Military Disciplinary Code, (FOR 1988-12-16 No. 1033), sections 1–5.*

<sup>18</sup> *Military Disciplinary Code, section 1.*

14.22 In peacetime, only officers and other soldiers of the Norwegian Armed Forces may be disciplined for matters arising during the course of military service. Civilian employees of the Norwegian Armed Forces are not subject to the Military Disciplinary Code in peacetime, although in armed conflict both civilian employees and others accompanying the armed forces, such as civilian cooks, will be subject to disciplinary measures. In international armed conflict, prisoners of war in Norwegian camps will also be subject to the Military Disciplinary Code.<sup>19</sup> This issue may arise both in Norway and during participation in international operations.

14.23 The following are the only permitted disciplinary measures:<sup>20</sup>

- detention for up to 20 days (60 days during armed conflict)
- a fine set in accordance with applicable guidelines
- restriction of movement
- reprimand

14.24 Collective disciplinary action is prohibited. Disciplinary action is not defined as punishment, but rather as a means of generating and maintaining military morale and discipline.<sup>21</sup> Although disciplinary action is not punishment, persons who are subjected to disciplinary action may not subsequently be punished for the same act or omission. Therefore, if an act or omission is so serious that the case is dealt with as a criminal case, the person may not also be subjected to disciplinary action.

14.25 Disciplinary action involves the completion of a form called a “disciplinary action order”. It must be pronounced, or communicated, to the disciplined individual. If this person accepts the disciplinary action, it may be implemented.

## Criminal law

14.26 For punishment under Norwegian law to be possible, there must be a breach of a penal provision under Norwegian law. There must also be subjective guilt, the person must be competent to stand trial, and no grounds for excluding criminal responsibility may apply.

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<sup>19</sup> *Military Disciplinary Code, sections 2, 3 and 4; see also Military Penal Code, section 9.*

<sup>20</sup> *Military Disciplinary Code, section 5; see also section 47 for wartime provisions.*

<sup>21</sup> *Military Disciplinary Code, sections 1 and 2.*

- 14.27 If a person is suspected of having committed a breach of Norwegian law, the matter will first be investigated to clarify what has happened. This also applies to breaches of, among others, the Geneva Conventions with additional protocols and of weapons conventions, since breaches of the law of armed conflict are governed by special provisions in Norwegian law. In addition, it must be clarified whether grounds for excluding criminal responsibility apply, such as self-defence, lawful act of war or mistake, such that the person may not be punished in any case. These conditions are explained below. If an indictment is issued, it will be considered by the Norwegian courts. Only where a state is unable or unwilling to prosecute war crimes, genocide or crimes against humanity may the International Criminal Court in The Hague consider prosecution.

### ***Criminal responsibility of Norwegian forces under Norwegian law (jurisdiction)***

- 14.28 Norwegian criminal and disciplinary jurisdiction applies to Norwegian forces while they are deployed both in Norway and abroad, unless otherwise provided by international law or international agreement.<sup>22</sup> In other words, acts which are subject to penal or disciplinary measures in Norway will generally also be so abroad unless provided otherwise.
- 14.29 Certain acts will never be lawful, while the lawfulness of other acts may depend on the situation. For example, torture is always punishable under Norwegian criminal law, whether committed in peacetime or during an armed conflict. Rape is another example of an act that is always punishable, regardless of gender and of whether the victim is a fellow soldier, member of the enemy's forces or civilian. Since an act of rape will never be militarily necessary and will always breach the requirement of humane treatment, it cannot be a lawful act of war. An example of a situation where lawfulness depends on the situation, is deprivation of someone's life. In most cases, killing another person will be punishable in Norway in peacetime, but it will be permitted in the context of armed conflict if the person is a lawful target.

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<sup>22</sup> *Act relating to personnel in the Norwegian Armed Forces of 2 July 2004 No. 59, see also Regulations relating to service in international operations, FOR 2004-12-10 No. 1643, section 23, Military Penal Code, section 11 and General Civil Penal Code (1902), section 12.3 and (2005), section 5.*

- 14.30 In addition to criminal law provisions applicable in peacetime, the provisions of Norwegian criminal law relating to war crimes will be particularly relevant during armed conflict. These are presented in sections 14.58–64, and are appended in full to this chapter.

### ***Criminal prosecution of foreign nationals for acts committed abroad***

- 14.31 In addition to having jurisdiction to prosecute acts committed abroad by Norwegian nationals or persons resident in Norway, Norway may also prosecute foreign nationals for acts committed abroad.<sup>23</sup> For example, Norway has an obligation under international law to investigate and indict persons located in Norway and suspected of having committed grave breaches of the law of armed conflict, irrespective of nationality. Alternatively, such persons may be extradited to another country that has grounds to indict them.<sup>24</sup> To date, the opportunity to prosecute foreign nationals for acts committed abroad has been little used in Norway, although it has been employed to prosecute persons suspected of committing war crimes, crimes against humanity and genocide in cases where the persons have subsequently obtained Norwegian citizenship.

### ***Conditions for criminal responsibility under Norwegian law***

- 14.32 To be punished under Norwegian law, certain conditions must be met. These are referred to as the “conditions for criminal responsibility”.

#### **CONDITIONS FOR CRIMINAL RESPONSIBILITY UNDER NORWEGIAN LAW**

- 1. Has the perpetrator violated a penal provision?*
- 2. Has the perpetrator demonstrated guilt? Is intent or negligence required?*
- 3. Does any ground for excluding criminal responsibility apply?*
- 4. Is the perpetrator competent to stand trial?*

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<sup>23</sup> *General Civil Penal Code (1902), section 12.4 and (2005), section 6.*

<sup>24</sup> *Geneva Convention I, Article 49; Geneva Convention II, Article 50; Geneva Convention III, Article 129; Geneva Convention IV, Article 146.*

## 1. Violation of penal provision

- 14.33 No-one may be sentenced for acts not prohibited by law.<sup>25</sup> The first condition for criminal responsibility is therefore that the act is described as punishable in a penal provision and is therefore unlawful. Further, the act must have been punishable at the time it was committed: no laws may be given retroactive effect.<sup>26</sup> It is important that all the conditions in the penal provision are met. In other words, the act in question must meet the full description in the penal provision, not only parts of it. For example, in order for perfidy to constitute a war crime, all of the following conditions must be met: leading someone to believe that one is entitled to protection, doing this for the purpose of exploiting such trust, and then killing or wounding a member of the population or armed forces of the enemy.<sup>27</sup> Note that although capturing a person through perfidy is also prohibited, doing so will not be a war crime.<sup>28</sup> Criminal offences include both prohibited activities and mandatory actions that are not carried out. For example, it is prohibited to drive a car without a driver's license, and persons involved in a car accident have a duty to assist injured persons. Correspondingly, it is prohibited to mistreat a prisoner of war, and there is a duty to release prisoners of war as soon as hostilities have ended.

## 2. Subjective guilt

- 14.34 Further, a perpetrator must have demonstrated guilt such that he can be blamed for the act. If the perpetrator cannot be blamed for the act, it will be unreasonable to punish him and punishment would have little preventive effect. There are two forms of subjective guilt under Norwegian law: intent and negligence. In most cases, a criminal offence is only punishable if committed intentionally. Intent means to engage in a punishable act with the awareness that the act will bring about a certain result. The outcome of the prohibited act may be intended (shooting to injure or kill, or refusing to follow orders), highly likely (shooting at a crowd knowing that someone is likely to be hit), or be held as possible but accepted anyway (shooting at a person to frighten, knowing that someone may be hit and accepting this as a possible consequence). An act may be considered intentional even if the perpetrator did not know that the act was unlawful.<sup>29</sup> This is because Norwegian law requires individuals to know what is lawful and unlawful.

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<sup>25</sup> *Norwegian Constitution, Article 96.*

<sup>26</sup> *Norwegian Constitution, Article 97.*

<sup>27</sup> *General Civil Penal Code (2005), section 106.g.*

<sup>28</sup> *Military Penal Code, section 108; see also Additional Protocol I, Article 37.*

<sup>29</sup> *General Civil Penal Code (1902), section 40 and (2005), section 22.*

- 14.35 Under certain penal provisions, persons may also be punished for negligence. Negligence is defined as acting in a careless manner as opposed to what is regarded as proper conduct. In other words, the perpetrator has not acted as a thoughtful and reasonable person would have acted. For example, if a car is driven, or a weapon is handled, in a negligent and careless manner, resulting in someone's death, the person responsible may be punished for involuntary manslaughter. What constitutes proper conduct will be situation-dependent, and will be assessed, among other things, by reference to the opportunities available to refrain from acting or to act correctly. To convict someone based on negligence, it must be possible to blame him or her for the unsatisfactory conduct, taking into account his or her personal circumstances.
- 14.36 Since the general rule under Norwegian law is that a criminal offence must be committed intentionally, a penal provision must state expressly that it extends to negligent acts if it is to be applied in that way. Some penal provisions specify that the requirement for guilt is gross negligence. Negligence will be gross if an act is highly censurable and there are grounds for apportioning considerable blame.<sup>30</sup> An example of gross negligence may be that of a person who believes a weapon to be unloaded and fires the weapon while it is aimed at another person, and the weapon proves to be loaded.

### *Mistakes of fact and mistakes of law*

- 14.37 If a person has violated the law without being aware of it (mistake), it will be important to determine whether this lack of knowledge related to the facts of the situation (mistake of fact), or whether it concerned a lack of knowledge of the law (mistake of law). The distinction between these two forms of mistake can be exemplified by the use of unlawful ammunition. If a Norwegian soldier engaged in a multinational operation picks up and uses unlawful ammunition in the belief that it is standard Norwegian ammunition, this is a mistake of fact. If he is aware of the type of ammunition, but not of the fact that it is prohibited for Norwegian forces, it will be a mistake of law.

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<sup>30</sup> *General Civil Penal Code (1902), section 40 and (2005), section 23.*



- 14.38 An important criminal law principle is that all persons shall be judged on the basis of their perception of the factual situation. It must therefore be clarified whether the perpetrator has misunderstood the situation (mistake of fact). An example of such a misunderstanding will be that of a soldier who believes a person is aiming a weapon at him and therefore fires first to avoid being shot. If it is subsequently established that the person did not have a weapon, but rather an object that looked like one, the question will be whether the soldier can be censured or blamed for the misunderstanding. If not, he should not be punished for it, either. If the soldier has acted recklessly, he has also acted negligently. In such cases, the act may be punished if it is covered by a penal provision which also encompasses negligence.<sup>31</sup>
- 14.39 The situation differs if someone has committed a criminal offence in the belief that the act is lawful, for example because he was unaware of the relevant penal provision, because he misunderstood the content of the penal provision, or because he received incorrect information about what is permissible (mistake of law). All persons have a duty to familiarise themselves with the laws relevant to them and their activities. It is particularly important, for example, for soldiers to be fully acquainted with the law of armed conflict. A mistake of law will not exempt a person from punishment if that person should have known of a prohibition, i.e. the lack of knowledge was negligent.<sup>32</sup> A soldier should, for instance, know the rules governing who and what constitute lawful targets, and the rules on the treatment of prisoners of war. In some cases, a mistake of law may nevertheless exclude criminal responsibility. A possible example of an excusable mistake of law is that of a soldier ordered by a Norwegian officer to assist foreign forces in carrying boxes of anti-personnel mines to a vehicle for transport to a minefield. Not all soldiers can be expected to be aware that the prohibition against use of anti-personnel mines includes this form of participation. When, in addition, the soldier receives his orders from a Norwegian officer, it will be difficult to regard the mistake as inexcusable and thus negligent.

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<sup>31</sup> *General Civil Penal Code (1902), section 42 (2005), section 25.*

<sup>32</sup> *General Civil Penal Code (1902), section 57 and (2005), section 26.*

### 3. Competence to stand trial – subjective condition of criminal responsibility

- 14.40 In order for a person to be liable to punishment, he must be competent to stand trial. A person is considered not to be competent to stand trial if he is under 15 years of age, psychotic, or mentally disabled to a high degree, or has strongly impaired consciousness. Reduced consciousness due to alcohol or narcotic substances will not exempt a person from punishment if the intoxicating substance has been consumed voluntarily.<sup>33</sup>

### 4. Aiding and abetting and attempt

- 14.41 Even if a penal provision is directed at the person who actually violates the provision, persons who are aiding or abetting in the commission of a violation will generally also be liable to punishment.<sup>34</sup> For example, a person driving detainees to a prison where they are unlawfully deprived of their liberty and mistreated could be held responsible for such deprivation of liberty and ill-treatment if he was aware that this would be a consequence of transporting them there.
- 14.42 Persons who have attempted to commit a criminal offence may also be punished for their attempt to violate the relevant penal provision. To be punished for an attempt, a perpetrator must have intended to commit the criminal offence and have taken direct steps towards doing so. There is no requirement for the crime to be planned for the immediate future. It is sufficient for the perpetrator to take steps he considers necessary to facilitate the crime. However, he will not be punished if he changes his mind and voluntarily refrains from committing the criminal offence, or if he feels remorse and succeeds in preventing the offence from occurring.<sup>35</sup> An example of an attempted war crime is shooting at civilians but missing them. In such circumstances, the shooter may be punished for attempting to kill civilians.

### *Possible grounds excluding criminal responsibility*

- 14.43 Even if the substance of a penal provision is infringed, the act does not necessarily result in punishment. There are several grounds for exemption from criminal responsibility, the most relevant of which will be discussed here.

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<sup>33</sup> *General Civil Penal Code (1902), sections 44–46 and (2005), section 20.*

<sup>34</sup> *General Civil Penal Code (2005), section 15.*

<sup>35</sup> *General Civil Penal Code (1902), sections 49–51 and (2005), section 16.*

### a. Lawful acts of war

- 14.44 In armed conflict, numerous acts which otherwise would have resulted in strict punishment may be committed without incurring criminal responsibility. Examples include the taking of life, causing bodily harm and material destruction of or damage to property. Although there is no general provision in the General Civil Penal Code stating that lawful acts of war are not to be punished, this is established, unwritten law. Accordingly, it is the law of armed conflict which defines which acts are lawful acts of war and which are not.
- 14.45 In order for an act to be a lawful act of war, it must be committed during an armed conflict by a person who has the right to participate in hostilities (lawful combatant) and for a war-related purpose, i.e. with the aim of weakening the enemy or strengthening one's own position in combat. A lawful act of war may therefore not be motivated by private considerations, such as personal gain or revenge. Such acts will not be militarily necessary. In addition, an act must otherwise comply with the rules of the law of armed conflict. In international armed conflicts, lawful combatants are entitled to participate in hostilities and thus to commit lawful acts of war.<sup>36</sup> In non-international armed conflicts, it is less clear who is entitled to participate in combat, since international law contains no provisions in this regard. In practice, states will grant their own forces immunity from criminal prosecution in respect of acts carried out in accordance with the law of armed conflict because they represent the lawful authorities of the state and are therefore entitled to participate in combat against rebel forces. On the other hand, rebels will not be considered entitled to participate in hostilities. Their actions will generally be regarded as criminal if they entail breach of national law, and will therefore be punished unless the state chooses to grant an amnesty.<sup>37</sup>
- 14.46 Actions that are not lawful acts of war could, in the first instance, be violations of national law. War crimes are another possibility, but these exist only if there have been grave breaches of the law of armed conflict. Two provisions of Norwegian law deal with violations of the law of armed conflict. The Military Penal Code provides for punishment for any breach of the Geneva Conventions and additional protocols, while the General Civil Penal Code of 2005 defines war crimes.

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<sup>36</sup> *Additional Protocol I, Article 43.*

<sup>37</sup> *See Additional Protocol II, Article 6(5).*

#### CONDITIONS FOR AN ACT OF WAR TO BE LAWFUL

1. *The act is committed during an armed conflict.*
2. *The act is committed by a person who has the right to participate in combat.*
3. *The act has a war-related purpose, i.e. is not a private act.*
4. *The act is consistent with the law of armed conflict.*

#### b. Orders

- 14.47 Orders may exempt a person from punishment, but only if the person carrying out the ordered act was obliged to obey the order and did not understand the order to be unlawful, and if the order was not manifestly unlawful. Orders are discussed in further detail in the sections on the duty of commanders and individual responsibility (see sections 14.10–14 and 14.15–17).

#### c. Self-defence

- 14.48 Persons have a right to defend themselves against unlawful attacks. Self-defence permits acts which are otherwise unlawful. In other words, an act of self-defence is an otherwise unlawful act which becomes lawful due to a preceding or imminent unlawful attack. Force may be used to defend oneself and others, even if this may ultimately entail the use of deadly force. In order for an act of self-defence to be lawful, it must:
- a. be committed to prevent an unlawful attack
  - b. not exceed what is necessary, and
  - c. not clearly exceed what is reasonable in view of the dangerousness of the attack, the legal right assailed and the guilt of the assailant<sup>38</sup>

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<sup>38</sup> *General Civil Penal Code (1902), section 48 and (2005), section 18.*

- 14.49 Pursuant to these conditions the use of force is also permitted to conduct a lawful arrest or to prevent the escape of a person lawfully detained or the execution of a sentence of imprisonment.<sup>39</sup>
- 14.50 As much force may be used as is necessary to prevent an attack, but no more. As soon as the attack has been halted, force may no longer be used, for example in revenge. However, force may be used to keep a person under control if he is regarded as a threat. The use of force must be proportionate to the threat which is to be prevented, and must be directed at the attacker.
- 14.51 The condition stipulating that the act to be defended against must be an unlawful act implies that force may not be used in self-defence against the exercise of lawful official authority or against a lawful act of self-defence by another party. However, persons are permitted to defend themselves against unlawful exercise of official authority and the person exercising such official authority is acting intentionally or with gross negligence.<sup>40</sup> The restriction of the right of self-defence to unlawful attacks also means that a soldier participating in an armed conflict will not be entitled to use force in self-defence against an enemy who is entitled to participate in hostilities and may thus regard the soldier as a lawful target. In such cases, the soldier will nevertheless be permitted to use armed force in accordance with the law of armed conflict, which grants greater scope for action than the right of self-defence. However, an attack on medical personnel will not be lawful under the law of armed conflict, and medical personnel may therefore act in self-defence in response to such an attack. For further discussion of the relationship between the law of armed conflict and self-defence; see sections 1.55–60.
- 14.52 Self-defence is not limited to persons, and may be exercised in response to any unlawful acts. It is permitted to defend oneself, another person, or property. For example, assisting another person to defend himself against an attack constitutes self-defence, and self-defence may be used to defend military property. The difference between defending persons and property follows from the condition that the use of force must be proportionate to the interest being assailed. As a rule, greater use of force will be accepted in the defence of persons than property. In some cases, the mandate for the operation, political guidelines or operational considerations may restrict the right of Norwegian personnel to act in self-defence to protect third persons or material assets (referred to as extended self-defence). However, the right to act in self-defence in response to an unlawful attack on one's own person cannot be restricted.

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<sup>39</sup> *General Civil Penal Code (1902), section 48.3 and (2005), section 18.2.*

<sup>40</sup> *General Civil Penal Code (2005), section 18.3.*

- 14.53 There is no requirement that an unlawful attack must have started before the right of self-defence may lawfully be used, but in such situations the conditions of necessity and proportionality are interpreted more strictly. This is referred to as preventive self-defence. The more specific a threat is, the clearer the right of self-defence will be, but every case must be assessed individually. For example, if a person threatens to attack and the threatened person has the opportunity to resolve the situation by leaving, it will be more difficult to argue for the use of force in self-defence than if the attack is unavoidable.
- 14.54 The perpetrator's perception of the situation must always form the starting point for any legal assessment. In the context of self-defence, this means that it is the subjective perception of the person who acted in self-defence, at the time the act was committed, which determines whether the act of self-defence was lawful. If a soldier is convinced that a person is ready to attack with a firearm, it is highly unlikely that he will be punished for defending himself against this person, even if it is subsequently discovered that the person was carrying a toy gun or an object that looked like a gun. An exception applies where the soldier can be said to bear blame for having misunderstood the situation. That could be the case if the soldier has not done everything feasible to verify that the person was in fact carrying a firearm. For further discussion of negligence, see sections 14.35–36.

#### d. Necessity

- 14.55 Not all dangerous situations are caused by an unlawful attack by another person. Acts which would otherwise be criminal offences may also be permitted in other situations to avert a threat. Necessity is the right to commit a criminal offence to rescue oneself or others in an emergency, at the expense of the rights of another person. The conditions are:
- a. that the act has been committed to protect life, health, property or other interests against a risk of harm that cannot be avoided by other reasonable means, and
  - b. that this risk of harm is far greater than the risk of harm associated with the act<sup>41</sup>

Like acts of self-defence, acts of necessity are lawful if the above criteria are satisfied.

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<sup>41</sup> *General Civil Penal Code (2005), section 17; see also (1902), section 47, where the condition is “particularly significant in relation to”, implying a greater overriding interest.*

## EXAMPLE 2: NECESSITY AND DURESS

During the trials which followed World War II, three police constables were charged with participating in the execution of a Norwegian sentenced to death by a Nazi court. The constables invoked necessity on the basis that they had been forced to participate under the threat of being killed themselves if they did not carry out the execution. They also argued that the Norwegian would have been executed whether they participated or not, so that refusing to take part would have meant sacrificing their own lives in vain.

The court concluded that the requirement that the object or person to be rescued must, on an objective assessment, be more valuable than the object or person to be sacrificed makes it impermissible to take the life of another to save one's own. Accordingly, the constables could not be acquitted, but since they would have been unable to save the Norwegian's life in any event, their sentences were reduced.

Supreme Court Reports 1950, page 377.

- 14.56 There is no restriction on the types of acts which may be lawful acts of necessity. The crucial requirement is that the object or person to be saved must be significantly more valuable than the object or person sacrificed. For example, a person who is lost in the mountains may break into a cabin to survive without doing anything illegal, although he will later have to compensate the owner for the damage he causes. The requirement for an overriding interest means that necessity cannot be invoked to sacrifice an innocent person's life to save one's own. One person's life is no more valuable than that of another person. Killing one person to save many is quite a different matter, and in extreme circumstances may be excusable and thus not punishable.

### *Military Penal Code*

- 14.57 As stated, the Military Penal Code applies both in Norway and, generally, abroad, during both peacetime and participation in armed conflict. The code deals with many different military matters, and will therefore not be discussed in detail here. As well as regulating responsibility for issued orders and the duty to obey orders (see sections 14.10–14 and 14.15–17 above), the code contains several provisions applicable during wartime. The following provision is of particular relevance to the enforcement of the law of armed conflict:

*A term of imprisonment of up to four years shall be given to any person who contravenes or participate in the contravention of provisions issued to protect persons or property*

- a) in the Geneva Conventions of 12 August 1949 on the amelioration of the condition of the wounded and sick in armed forces in the field, on the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, on the treatment of prisoners of war and on the protection of civilian persons in time of war,*
- b) in the two additional protocols of 10 June 1977 to these conventions, unless the matter falls under a stricter penal provision.<sup>42</sup>*

This encompasses both the Norwegian prohibition against war crimes and other penal provisions covering the same acts.

### **War crimes**

- 14.58 This part reviews war crimes that are governed under Norwegian law. The Norwegian provisions define war crimes more broadly than the International Criminal Court in The Hague (ICC).<sup>43</sup> This means that there is little risk that Norwegian forces may end up in The Hague, since the International Criminal Court only considers cases where the national authorities in question lack the ability or willingness to prosecute.<sup>44</sup> In addition to war crimes, the General Civil Penal Code of 2005 also regulates genocide and crimes against humanity. However, since genocide and crimes against humanity are not linked to violations of the law of armed conflict as such, they are not included in this overview.

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<sup>42</sup> *Military Penal Code, section 108.*

<sup>43</sup> *Rome Statute of the International Criminal Court of 17 July 1998.*

<sup>44</sup> *Rome Statute, Article 17.*





*Several German leaders were convicted of war crimes at the Nuremberg trials in 1946. Baldur von Schirach is shown standing behind the microphone. Front row, from left to right: Goering, Hess, Ribbentrop, Keitel, Kaltenbrunner and Rosenberg. Photo: akgimages/NTB Scanpix.*

- 14.59 War crimes are grave breaches of the law of armed conflict. The Norwegian General Civil Penal Code operates with five categories of war crimes. The first three are classified according to the object of protection: persons; property and civil rights; and humanitarian missions and distinctive signs. The final two categories regulate the use of prohibited methods and means of warfare. The provisions are appended in full to this chapter.

### War crimes against persons

- 14.60 The provision on war crimes against persons regulates grave breaches of the rules on protecting persons who are not, or are no longer, participating actively in hostilities and persons entitled to special protection under the law of armed conflict. Such protection is discussed in greater detail in, among other things, chapter 4 on protected persons and chapter 13 on occupation. In other words, the penal provision is based on the principle of distinction and the principle of humanity, and makes it clear that grave breaches will be punished.

### War crimes against property and civil rights

- 14.61 The provision on war crimes against property and civil rights confirms the prohibitions against pillage and unnecessary destruction, seizure or confiscation of property and the disregarding of civil rights. These prohibitions

are dealt with in greater detail in, among other places, chapter 6 on prisoners of war and security detainees and chapter 7 on objects.

### War crimes against humanitarian missions or distinctive emblems

- 14.62 The provision on war crimes against humanitarian missions or distinctive signs strengthens the protection given to persons who try to reduce unnecessary suffering in armed conflict, and promotes respect for protective emblems. This is discussed further in the chapters on protected persons, medical services and methods of warfare (chapters 4, 5 and 9).

### War crimes committed using prohibited methods of warfare

- 14.63 The provision on war crimes that are committed using prohibited methods of warfare regulates grave breaches of the principles of distinction and proportionality, and contains provisions on attacks against civilians, undefended localities and objects enjoying special protection; the starvation of civilians; damage to the natural environment; and the use of human shields, perfidy and declarations that no quarter will be given. These methods are discussed further in the chapters on objects and methods of warfare (chapters 7 and 9).

### War crimes committed using prohibited means of warfare

- 14.64 The provision on war crimes that are committed using prohibited means of warfare refers to both specific regulation of means of warfare and general regulations. Among other things, this implies that the use of weapons which by their nature will cause superfluous injury or unnecessary suffering may be punished as war crimes. The regulation of means of warfare is covered in detail in chapter 8 on means of warfare (weapons).

## Dealing with crimes committed by others

- 14.65 There are clear rules on how Norwegian military commanders should deal with possible crimes committed by members of the Norwegian Armed Forces; see sections 14.10–14 above. However, it is less clear how Norwegian forces should react to possible criminal offences committed by the forces of another country or rebel groups. This applies to acts that may still be averted as well as acts already carried out. A distinction must be made between situations where Norwegian forces have a duty to intervene and situations where they have no such duty but may nevertheless be permitted to do so. The question of jurisdiction to investigate and prosecute persons suspected of having committed criminal offences is discussed in sections 14.28–31, and will therefore not be covered here.

14.66 The question of when Norwegian forces may intervene in the actions of others will in many cases be clarified by agreements between the relevant states and in the mandate for the operation. If Norway is participating in an international force, special agreements may have been concluded by the participating nations which describe how forces are to deal with any criminal offences which are being or have been committed by forces belonging to a participating nation. Special agreements may also have been concluded with the host nation, and these may contain provisions stating whether the international forces are to have any form of police authority. The mandate for the operation and the rules of engagement may also specify when forces may actively intervene to avert situations which do not involve other participating nations, for example to protect the civilian population against serious crimes. As a rule, military forces shall not engage in police work, although in some operations this may be one of the tasks specified in the mandate and the rules of engagement. Possible examples in this regard include manning roadblocks and providing security in connection with local elections. The Norwegian authorities may also issue guidelines on Norwegian forces' compliance with such rules of engagement. For further discussion of this topic, see chapter 12.

Occupying forces are subject to separate rules on the exercise of authority; see chapter 13.

14.67 Normally, there will be no duty to avert an ongoing or imminent criminal offence, especially if doing so would entail risk for those who intervene. An exception is the responsibility of military commanders for their own forces and the duty to prevent these forces from committing criminal offences (see sections 14.12–13). There is also a duty to intervene to prevent genocide.<sup>45</sup> It is unclear whether this duty can also be said to include crimes against humanity and war crimes, so this will depend on the type of cooperation between Norwegian and foreign forces. If the foreign forces are subject to Norwegian command, the responsibility of military commanders may extend to foreign units. Further, if a failure to intervene is interpreted as acceptance of and support for an act, this may constitute punishable aiding or abetting.<sup>46</sup>

14.68 Intervention in the actions of forces of another country in connection with breaches of the law of armed conflict will therefore depend on the gravity of the breach. If intervention is necessary to prevent a war crime, for example an attack on civilians, a duty to intervene may apply regardless of the circumstances. However, if the situation only involves breaches that do not

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<sup>45</sup> *Convention on the Prevention and Punishment of the Crime of Genocide, Article 1.*

<sup>46</sup> *General Civil Penal Code (2005), section 15.*

entail an immediate threat to life, health or protected objects, it will be correct to report the matter to national superiors through the chain of command.

- 14.69 In situations where no duty to intervene exist, use of force may nevertheless be permitted to stop a crime if someone is exposed to an immediate threat to life or health. The use of force to protect others will be lawful if the conditions of self-defence are met. Self-defence permits the use of force to halt or prevent an unlawful attack on oneself or others. The conditions for lawful exercise of self-defence are presented in sections 14.48–54. Self-defence in other words permits the use of force both to defend one’s own forces – whether Norwegian or other – and any other person. The use of force in self-defence to protect persons who are not part of a force will often be regulated in greater detail in the rules of engagement. This is because it is sensible to maintain control over a force’s interventions with respect to the local population. The use of force against third parties may therefore be restricted to cases where there is a risk of death or serious injury, i.e. cases of serious crimes. In operations where such issues are likely to arise, guidance should be given in advance as to how military forces are to handle such interventions.

## Reprisals and reparation: state responsibility

- 14.70 Reprisals and compensation for violations of international law are primarily a state responsibility, but will nevertheless be discussed here because there is a close link with individual responsibility.

### *Reprisals*

- 14.71 Reprisals are otherwise unlawful acts carried out to force the enemy to refrain from certain unlawful actions. Reprisals are only permitted in international armed conflicts. In other words, an opportunity exists to force the enemy to respect the law of armed conduct by violating it oneself, but since this may quickly cause a conflict to escalate, strict requirements govern when and how acts of reprisal may be employed. First, the enemy must be requested to cease its unlawful actions, and a warning must be given that reprisals will be used unless the unlawful acts cease. If this is insufficient to force the enemy to stop, and there are no other feasible solutions to the problem, reprisals may be employed. Reprisals may only be directed at lawful targets, they must be proportionate to the original wrongful act and may not go further than necessary to influence the conduct of the enemy. Reprisals against protected persons or objects are prohibited.<sup>47</sup> It must also be communicated that the act is an act of reprisal, so that it is not interpreted as an unlawful act. Since acts of

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<sup>47</sup> *Geneva Convention I, Article 46; Geneva Convention II, Article 47; Geneva Convention III, Article 13; Geneva Convention IV, Article 33; Additional Protocol I, Article 20.*

reprisal are themselves normally unlawful, they must only be used as a last resort.

- 14.72 Since acts of reprisal are only permitted against otherwise lawful targets, this method has a limited scope of application. The only lawful reprisals Norwegian forces may conceivably engage in will be the use of otherwise unlawful means of warfare (weapons) or methods of warfare to force an enemy to cease its violation of the law of armed conflict. In any event it is hard to see how departing from the prohibition against inflicting superfluous injury or unnecessary suffering on combatant persons could be a lawful act of reprisal.<sup>48</sup> Since reprisals are by definition otherwise unlawful acts and will therefore entail violation of Norway's obligations under international law (for example weapons conventions), the decision to initiate such reprisals must be made at the strategic level, i.e. by the Ministry of Defence
- 14.73 If an act of reprisal is conducted in a manner that does not comply with the applicable conditions, the individuals involved may bear criminal responsibility for the unlawful act.

### *States' duty to pay compensation for violations of the law of armed conflict*

- 14.74 If Norwegian forces violate the law of armed conflict, Norway may be required to pay compensation to the enemy.<sup>49</sup> Such compensation claims are normally settled after an armed conflict has ended. For example, Germany was ordered to pay war reparations to the Allies after World War I, with the final payment being made in 2010. After the 1990–1991 Gulf War, the UN Security Council decided through resolutions 687 (1991) and 692 (1991) that Iraq should pay compensation to Kuwait.

## **Independent supervision/inspection**

- 14.75 The parties to an armed conflict will generally face challenges in cooperating and reaching a common understanding of the situation. Accordingly, it will be advantageous to secure the support of independent parties in different areas. For example, an independent party may visit imprisoned persons, pass messages between prisoners and their families, investigate possible violations of the law of armed conflict and assist in mediation and peace negotiations.

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<sup>48</sup> *Additional Protocol I, Article 35(2).*

<sup>49</sup> *Additional Protocol I, Article 91.*

## *Protecting power*

- 14.76 At the start of an international armed conflict or occupation, the states involved are generally required to appoint a protecting power to assist them in meeting their obligations under the law of armed conflict.<sup>50</sup> Since both parties must approve the states which are to function as protecting powers, this is not done in all conflicts. Instead, the ICRC has played this role. The ICRC is often already present in the area when a conflict begins, and is internationally recognised as neutral. It is therefore often practical to utilise the ICRC's existing scope for action instead of introducing a new party in the form of a protecting power.
- 14.77 In non-international conflicts, there is no system of protecting powers, although the parties may nevertheless choose to use such neutral parties. They may also choose to assign the ICRC this role; see sections 14.80–82 below.
- 14.78 The responsibilities of protecting powers are discussed in the relevant chapters, but can be summarised as follows. A protecting power shall:
- Safeguard the interests of the parties to the conflict and apply the conventions.<sup>51</sup>
  - Help to resolve the conflict, for example by proposing a meeting between the parties at a neutral location.<sup>52</sup>
  - Visit prisoners of war and detained civilians, and conduct interviews with detainees without witnesses present, either directly or through an interpreter. The protecting power shall be free to choose locations for visits, and to determine the duration and frequency of such visits. Visits may only be refused if necessary for imperative military reasons, and even then only in exceptional cases and temporarily.<sup>53</sup> An example of such imperative military reasons is if the security situation is so serious that it will be impossible to protect the representatives of the protecting power.
- 14.79 If no protecting power is appointed or approved by both parties, the ICRC can play this role.

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<sup>50</sup> *Additional Protocol I, Article 5.*

<sup>51</sup> *Geneva Conventions I, II and III, Article 8; Geneva Convention IV, Article 9.*

<sup>52</sup> *Geneva Conventions I, II and III, Article 11; Geneva Convention IV, Article 12.*

<sup>53</sup> *Geneva Convention III, Article 126; Geneva Convention IV, Article 143.*

## *The International Committee of the Red Cross*

- 14.80 The International Committee of the Red Cross (ICRC) plays a special and vital role in armed conflicts.<sup>54</sup> Unlike other non-governmental organisations, the ICRC is accepted by all states as an independent, non-political organisation with special rights to ensure compliance with the law of armed conflict. The ICRC runs central information bureaus (see sections 4.75–79), maintains lists of prisoners of war, inspects prison camps and provides relief supplies for both internees and the civilian population in conflict areas.<sup>55</sup> The ICRC also seeks to assist parties to find solutions to a conflict and help states to meet their obligations under the law of armed conflict.<sup>56</sup>
- 14.81 Parties to international armed conflicts are obliged to take all feasible steps to allow the ICRC and national Red Cross/Red Crescent organisations to perform the functions assigned to them under the law of armed conflict to provide protection and assistance to the victims of conflicts.<sup>57</sup> Since fewer states are appointing protecting powers than previously, the prominence of the ICRC has increased. The ICRC has also expanded its focus to include non-international armed conflicts, where the parties accept its involvement. For example, they have been working with both ISAF forces and rebel groups in Afghanistan for many years.
- 14.82 It is vital for the ICRC that it be regarded as entirely independent and neutral, so that it can gain access to persons in need of protection and support. Therefore, the ICRC only criticises parties to a conflict in exceptional cases, and does not use information in its possession to support criminal prosecutions.

## *Independent fact finding*

- 14.83 Both during and after an armed conflict, one or several parties to the conflict will often accuse other parties of having committed war crimes and other violations. This may be based on real concerns that such crimes have taken place, or be part of propaganda designed to undermine support for the enemy among the local population or internationally. In many such cases, a simple investigation of the facts will reveal that the allegations are untrue, particularly if forces have good routines in place for reporting incidents and collecting information on the scale of damage and similar matters.

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<sup>54</sup> *Geneva Conventions I, II and III, Articles 9 and 11; Geneva Convention IV, Articles 10 and 12; Additional Protocol I, Article 5.*

<sup>55</sup> *Geneva Convention III, Articles 123, 125 and 126; Geneva Convention IV, Articles 140, 142 and 143.*

<sup>56</sup> *Geneva Conventions I, II and III, Article 11; Geneva Convention IV, Article 12.*

<sup>57</sup> *Additional Protocol I, Article 81.*

14.84 In some cases, there is a need for independent fact finding. Although such an international fact finding commission has been established under the Geneva Conventions,<sup>58</sup> as per 2012 it had not been used. Instead, the UN has on several occasions established expert groups mandated to investigate specific conflicts. For example, this was done to investigate alleged violations of the law of armed conflict during the Iran-Iraq war in 1984–1988, in the former Yugoslavia in 1992, possible human rights breaches and violations of the law of armed conflict during the Israeli campaign in Gaza 2008–2009, and whether Libyan government forces, rebel forces or NATO forces violated human rights and the law of armed conflict during the conflict in Libya.

### *The UN and the Security Council*

14.85 The UN, and the Security Council in particular, play an important role in armed conflicts. In many cases, the Security Council will issue a mandate authorising one party to a conflict to use necessary force to maintain international peace and security. Since the use of force against other states is generally prohibited, such mandates will specify the strategic framework for the use of force. For example, resolution 1973 (2011), the mandate for the operation in Libya in 2011, specified in that necessary force could be used to protect civilians and enforce the no-fly zone over Libya.

14.86 In addition to authorising military use of force, the UN Security Council has power to initiate investigations into possible war crimes and other serious crimes, and to authorise the use of force to stop or prevent violations. The Security Council has also established tribunals to conduct trials following extensive breaches of international criminal law, for example the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

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<sup>58</sup> *Additional Protocol I, Article 90.*



## Annex to chapter 14: War crimes under the Norwegian General Civil Penal Code of 2005<sup>59</sup>

### *Section 103: War crimes against persons*

*Any person is liable to punishment for a war crime who in connection with an armed conflict*

- a) kills a protected person,*
- b) inflicts great suffering or considerable harm to body or health on a protected person, particularly through torture or other cruel or inhuman treatment,*
- c) enslaves a protected person,*
- d) subjects a protected person to rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or other similarly aggravated forms of sexual violence,*
- e) takes a protected person hostage,*
- f) conscripts or recruits children under 18 years of age to armed forces or uses them actively as participants in hostilities,*
- g) subjects a protected person to a medical or scientific experiment that is not in the person's interest and that entails serious risk to the person's life or health,*
- h) contrary to international law deports or forcibly relocates a protected person from an area in which the person is lawfully present, or unlawfully confines a protected person,*
- i) imposes or implements a penalty against a protected person without the person first having received a fair trial in accordance with international law,*
- j) grossly violates a protected person's dignity through humiliating or degrading treatment, or*
- k) injures a combatant who has surrendered or is incapable of participating in combat.*

*Also subject to punishment in an international armed conflict is any party that*

- a) transfers part of its own civilian population to an occupied area,*
- b) forces a citizen of the opposing party to participate in acts of war against his/ her own country, or*
- c) forces a protected person to serve in the armed forces of a hostile power.*

*A protected person is a person who is not, or is no longer, actively participating in hostilities, or who is otherwise protected by international law.*

*The penalty for a war crime against a person is imprisonment for a term not exceeding 15 years, or up to 30 years in the cases specified in the first paragraph, a) to e), or otherwise if the crime is aggravated. In determining whether a crime is aggravated, weight shall be given to factors including the crime's potential for harm and harmful effects and whether it was committed as part of a plan or objective or as part of large-scale commission of such crimes.*

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<sup>59</sup> General Civil Penal Code (LOV 2005-05-20 No. 28), chapter 16.

*«This is an unofficial translation of the Norwegian version of the Act and is provided for information purposes only. Legal authenticity remains with the Norwegian version as published in Norsk Lovtidend. In the event of any inconsistency, the Norwegian version shall prevail.*

*The translation is provided by the Ministry of Justice and Public Security.»*

### **Section 104: War crimes against property and civil rights**

*Any person is liable to punishment for a war crime who in connection with an armed conflict*

- a) pillages,*
- b) engages in extensive destruction, seizure or confiscation of property that is not strictly necessary for the purposes of warfare, or*
- c) declares the civil rights of the opposing party's citizens, or their opportunity to have these reviewed by the courts, to be annulled or temporarily set aside.*

*The penalty for war crimes against property or civil rights is imprisonment for a term not exceeding 10 years, or up to 30 years if the crime is aggravated, see section 103, fourth paragraph, second sentence.*

### **Section 105: War crimes against humanitarian missions or distinctive emblems**

*Any person is liable to punishment for a war crime who in connection with an armed conflict*

- a) directs an attack against personnel, facilities, materiel, units or vehicles involved in humanitarian aid work or peacekeeping operations in accordance with the UN Charter, provided that these are entitled to protection as civilian persons or property under international law,*
- b) directs an attack against personnel, buildings, materiel, medical units or means of transportation that under international law are entitled to use one of the specifically protected distinctive signs defined in the Geneva Conventions and Additional Protocols or other means of identification showing that they are protected by the Geneva Conventions, or*
- c) misuses a flag of truce or the flag, distinctive military sign or uniform of the enemy or the United Nations, or misuses the specifically protected distinctive signs specified in b), in a way that a person dies or suffers considerable harm.*

*The penalty for war crimes against humanitarian missions or distinctive signs is imprisonment for a term not exceeding 10 years, or up to 30 years in the cases specified in c), and otherwise if the crime is aggravated, see section 103, fourth paragraph, second sentence.*

### **Section 106: War crime consisting in the use of prohibited methods of warfare**

*Any person is liable to punishment for a war crime who in connection with an armed conflict*

- a) directs an attack against the civilian population in general or individual civilians who are not participating in the hostilities,*
- b) uses starvation of civilians as a method of warfare by taking, withholding or refusing access to food or objects essential for their survival, or hindering relief supplies in violation of international law,*

- c) implements an attack in the knowledge that such an attack will cause loss of civilian life, injury to civilians, damage to civilian objects or damage to the natural environment that would be excessive relative to the specific and immediate overall military benefit that is anticipated,*
- d) uses the presence of a protected person to preclude certain locations, areas or armed forces from being subject to military operations,*
- e) directs an attack against cities, towns, locations, settlements or buildings that are undefended and do not constitute military targets, or against demilitarised zones,*
- f) directs an attack against buildings devoted to religion, education, art, science or charitable purposes, against historic monuments, cultural monuments, hospitals or gathering places for sick and wounded persons or against other civilian objects that are not military targets,*
- g) leads a person to believe that he/she is entitled to protection or has a duty to afford protection under international law and with the intention of betraying the resulting trust kills or wounds a person who is a citizen of the opposing party or a member of the opposing party's armed forces, or*
- h) declares or threatens that no quarter will be given.*

*The penalty for a war crime involving the use of prohibited methods of warfare is imprisonment for a term not exceeding 15 years, or up to 30 years if the crime involves the intentional killing of a civilian or other protected person, or otherwise if the crime is aggravated, see section 103, fourth paragraph, second sentence.*

## ***Section 107: War crime consisting in the use of prohibited means of warfare***

*Any person is liable to punishment for a war crime who in connection with an armed conflict*

- a) uses poison or poisonous weapons,*
- b) uses biological or chemical weapons,*
- c) uses bullets that easily expand or flatten inside the human body, or*
- d) uses other means of warfare that are contrary to international law.*

*The penalty for a war crime committed using prohibited means of warfare is imprisonment for a term not exceeding 15 years, or up to 30 years if the crime involves the intentional killing of a civilian or other protected person, or otherwise if the crime is aggravated, see section 103, fourth paragraph, second sentence.*



# 15

## Rules of engagement

### Introduction

- 15.1 Rules of engagement (ROE) are directives given to ensure that forces comply with the law of armed conflict and other legal or political restrictions introduced with respect to warfare, and to ensure political control over the use of military force. Rules of engagement are therefore an important command and control instrument for securing specified conduct.

This chapter contains an overview of rules of engagement, their use and their development. Much of the information is taken from NATO's MC 362/1 Rules of Engagement.

### General comments on the interpretation and application of rules of engagement

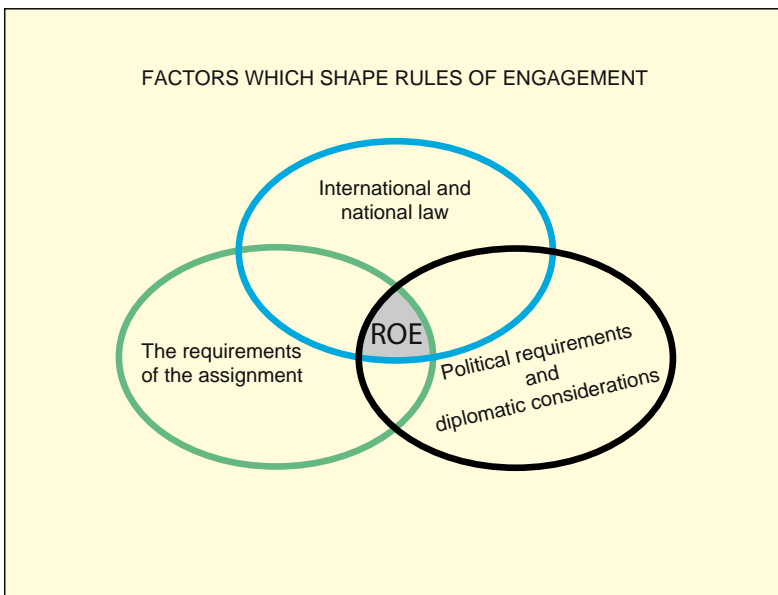
- 15.2 Rules of engagement are directives issued by a competent authority which regulate the circumstances under which military force may be used and the type and degree of force which may be used in a given situation. Rules of engagement describe what is permitted and what it is prohibited. In armed conflict, rules of engagement will lay down restrictions on acts which are generally and under normal circumstances permitted under the law of armed conflict. Rules of engagement shall be adopted specifically for each operation, and in some cases different rules of engagement may be prepared for different units. Operations which are politically, operationally and tactically complex will often have more complex rules of engagement.
- 15.3 Normally, Norwegian Joint Operational Headquarters prepares rules of engagement as part of the general operational planning process. However, situations may arise where rules of engagement are prepared by others than Norwegian Joint Operational Headquarters. Following drafting at operational level, rules of engagement shall be sent to the Ministry of Defence for political approval. At the Ministry, rules of engagement are subjected to political and legal checks. For example, rules of engagement must always comply with Norwegian law and Norway's obligations under international law. Once rules of engagement are approved by the Ministry of Defence, the Chief of Defence

is tasked with implementing them in the chain of command.<sup>1</sup> When Norway is participating in a NATO operation, NATO's rules of engagement shall be followed unless otherwise indicated. If national rules of engagement have been issued in addition to NATO's rules, the national rules of engagement prevail. "Prevail" means that if there are discrepancies between the two sets of rules of engagement, the Norwegian rules must be followed. In addition, Norway may choose to adopt national restrictions for Norwegian personnel and their use (caveats), which will limit the application of NATO's rules of engagement. Rules of engagement may never limit the right of self-defence.

- 15.4 Rules of engagement reflect military needs, legal framework and political guidance. Political guidance may specify how rules of engagement should be interpreted and how changes in a situation should be dealt with. Such guidance may be issued as force commander's directives. An example of political guidance with a direct impact on the application of rules of engagement is orders to avoid all collateral damage, even if this would be proportionate and thus not contrary to the law of armed conflict. In addition to specific political guidance, more general guidance may be issued on contemporary political and military strategy. This will be reflected in the rules of engagement and will affect how the rules of engagement must be interpreted and applied. In the NATO context, this is done by including an indicator in the form of the letters X, Y or Z. The letter indicates the overall strategy: to reduce involvement (X = de-escalation), maintain the balance in the area (Y = maintain status quo), or actively influence the situation, entailing that escalation is accepted (Z = risk of escalation is acceptable).
- 15.5 Rules of engagement must never be considered in isolation from other operational plans, orders and directives in which the rules of engagement are operationalised. It is therefore important to maintain an overview of relevant operational plans, as these influence both the conduct of operations and the interpretation and application of rules of engagement. For example, there may be separate standard operating procedures (SOPs) for the escalation of use of force, target selection, capture and treatment of prisoners, and information-collection. A further example, mentioned above, is that of directives by force commanders. Operational and supplementary orders may also clarify how applicable plans and procedures should be understood and applied.

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<sup>1</sup> *The Chief of Defence's directive on operational activities of 15 December 2011.*



- 15.6 In other words, rules of engagement are an operational tool for military commanders. It is therefore important that personnel working with the planning and conduct of operations are highly familiar with the applicable rules of engagement. In addition, the legal advisers in the Norwegian Armed Forces should be consulted regarding the interpretation of applicable rules of engagement, and for guidance on their application. Military commanders should also consult the legal advisers when formulating justifications for requested amendments and the release of rules of engagement retained at a higher level. Depending on the circumstances, breach of rules of engagement may trigger disciplinary action or be punished as a violation or failure to comply with lawful orders, or as neglect of duty (see the information box in section 14.57).

#### EXAMPLE OF A RULE OF ENGAGEMENT UNDER MC 362/1

ROE 183. Use of minimum force to detain a person or persons who pose a threat to NOR forces and their missions, or where detention is necessary for execution of the mission, is authorised.

AMPLN 1: Detention includes the right to search.

AMPLN 2: Detention guidance applies.

## Differing use of rules of engagement in peacetime and armed conflict

- 15.7 Rules of engagement are used both for operations in which forces are to participate in an armed conflict and operations in which they are not. If forces are to participate in an armed conflict, the rules of engagement will restrict actions otherwise permitted under international and national law, particularly the law of armed conflict. Such restrictions result from political objectives and guidelines, as well as military command and control. For example, restrictions may be placed on the conduct of operations in areas close to neighbouring countries which it is important not to provoke. Moreover, requirements may be laid down regarding the number and kind of information sources (sensors) used to identify persons or objects as lawful targets.
- 15.8 In operations where forces are not participating in an armed conflict, either because the situation in the area does not constitute such a conflict or because forces are not participating directly in hostilities, the main ground for the use of force will be personal self-defence or a special mandate from the UN Security Council. Rules of engagement for such operations may specify how the different troop-contributing nations should harmonise their self-defence legal basis to ensure that forces have as uniform a scope for action as possible. In addition, the rules of engagement may specify whether force beyond self-defence may be used, if permitted by the mandate.

## Main categories of rules of engagement

- 15.9 Rules of engagement can be divided into two general categories: rules governing the use of force in attack and other use of force.

### *Use of force in attack*

- 15.10 This category only applies in armed conflicts in which certain persons or objects qualify as lawful targets under the law of armed conflict, or in situations in which the use of force beyond self-defence is authorised by a special mandate from the UN Security Council.

### *Use of force to counter hostile intent or a hostile act*

- 15.11 Rules of engagement will often contain special provisions on the use of force in response to a hostile act or a demonstration of hostile intent. NATO uses such rules of engagement not least to ensure that all countries have the same opportunities and are subject the same restrictions on the use of force in the protection of forces. Since some states operate with a broader right of self-defence than others in terms of what may be protected, how much force may



be used and how imminent a threat must be, there is a need to grant other states similar opportunity to use force. In addition, unlike in the case of self-defence, the application of such rules of engagement will not be restricted by such challenges as those faced by Norwegian forces due to the prohibition against planning for use of force in self-defence and the condition that the actual threat must be unlawful.

- 15.12 Rules of engagement will, primarily, permit the use of force in response to a demonstration of hostile intent or a hostile act, provided that these are directed at a party's own forces or members of a coalition of international forces in which the party is participating. In addition, the use of force in defence of other defined groups of personnel and property may be permitted, although in such instances the use of force will usually be governed by separate rules of engagement. The types of persons and property in question will ordinarily be pre-defined by the force commander for the operation.

*Demonstration of hostile intent*

- 15.13 A demonstration of hostile intent is a likely and identifiable threat characterised by the ability and willingness of threatening persons or groups to cause injury, combined with information indicating that such persons or groups intend to attack or otherwise cause such injury. Examples of demonstrations of hostile intent include preparing or positioning weapons and forces for attack, illuminating targets with fire-control radar, and increased transportation of troops and munitions. Adequate information must be available to conclude that the threat is clear and significant. Individual actions without supporting information regarding an intention to attack or injure will not constitute demonstrations of hostile intent. If an attack is imminent, however, a self-defence situation may arise.

*Hostile act*

- 15.14 Rules of engagement which regulate the use of force in response to hostile acts permit soldiers to deal with groups or persons deliberately conducting or directly contributing to actions which seriously undermine or present a serious threat to the enemy's forces. Examples of such hostile acts include minelaying, violation of a no-fly zone by aircraft which refuse to submit to interception, and actions which deliberately hamper the enemy's military operations. If an act constitutes an attack justifying the use of force in self-defence, it will not be regulated by the rules of engagement.

**Regulation of offensive use of force**

- 15.15 Use of force against persons who are not engaged in a hostile act or demonstrating hostile intent, but who are lawful targets, is considered offensive

use of force. This is because a party's own forces initiate the confrontation. Rules of engagement regulating the offensive use of force may vary from permitting attacks on all persons in a defined group, to describing situations in which attacks are permitted. For example, forces may be authorised to attack persons that have previously attacked or assisted in an attack on them; to attack military installations, buildings and equipment that constitute an effective contribution to military action threatening the forces or their objects; or to attack persons who contribute effectively to the conduct of enemy military operations against the forces. Rules of engagement may also permit attacks on persons who threaten a pre-defined group of persons or objects, as in the case of defensive rules of engagement. The content of the term "attack" is described in greater detail in section 15.21 (below) and in section 2.2.

### *Other use of force*

- 15.16 In addition to regulating the use of force in attack, rules of engagement will contain provisions on when, and how much, force may otherwise be used. As a rule, this will be influenced by the mandate for the operation, since this will contain provisions on the primary purpose of a given operation. Examples of rules of engagement in this category include rules on the diversion and boarding of vehicles and vessels, the use of chemicals for riot control purposes and the conduct of information operations and electronic warfare. Other examples include rules of engagement permitting the use of force, for example to prevent interference in the mission, prevent the loss of equipment, secure freedom of movement, defend certain partners, free persons or equipment, or stop penetration of certain areas. The persons or areas in question will be specifically defined in the rules engagement or annexes to these. The use of force in the conduct of an operation will be limited to "minimum use of force". This is discussed further in sections 15.18–20 below.

## **Minimum use of force and attack**

- 15.17 Rules of engagement will often describe the use of force using two terms: minimum use of force and attack. These terms have differing meanings, which will be explained below.

### *Minimum use of force*

- 15.18 Minimum use of force means having permission to use force up to and including deadly force if necessary and proportionate to accomplish the mission. This means that one shall not use greater force if less force, or even a show of military force, will be sufficient. If deadly force is not permitted, this will have to be specified, for example by stating that "minimum use of force is authorised, not including deadly force".

- 15.19 The rules of engagement authorising the use of minimum force would in most cases be the rules permitting the use of force against the adversary in situations where attack is not authorised. If such rules apply in operations in which forces are involved in an armed conflict, the understanding of necessary and proportionate use of force may be interpreted more broadly than, for example, in peacekeeping operations. This is because use of greater force is generally permitted in armed conflict than in peacetime.
- 15.20 The term “minimum use of force” is used in rules of engagement to ensure that the use of force does not exceed the level indicated by military or political considerations. If a person or object qualify as a lawful target, there is no obligation under international law to use the least possible force when combating the person or object.

### ***Attack***

- 15.21 Rules of engagement which authorise attacks on certain persons or groups in certain situations are considered offensive rules of engagement. If an attack is authorised, this will permit the use of force unrestricted by what is necessary and proportionate in view of the threat. Instead, the use of force will be limited by what is lawful according to the law of armed conflict. First, the target of the attack must be a lawful target under the law of armed conflict (see chapters 3 and 7). Second, the attack must be militarily necessary, and the military advantage to be achieved by the attack must be proportionate to any unavoidable civilian losses (the principle of proportionality). However, this does not mean that the use of force is only limited by the law of armed conflict; it is particularly important to respect both military and political guidelines when applying offensive rules of engagement.

### **Command and control**

- 15.22 As stated initially, rules of engagement are a tool of political control over military operations, and for military commanders to exercise command and control. In addition to governing when and how force may be used, rules of engagement may regulate the areas in which forces may operate and the kinds of permitted activities. Rules of engagement will also specify the level authorised to approve different activities, so that the application of the rules is not left solely to the individual soldiers. This can be done in several ways. The force commander for an operation may choose to delegate authority to approve the use of certain rules of engagement by lower levels of the organisation in the form of orders. This requires that the relevant rule of engagement is not retained at a certain level in the chain of command. Such delegation will often be assigned to a specific level, normally unit level,

although it may also be assigned to a certain rank of officer. A delegation order may provide that the lower commanding officer may not delegate further, but if no such restriction of delegation is imposed, authority to approve the use of the relevant rule of engagement may be delegated further. Rules of engagement which are delegated may also be withdrawn, meaning that such approval authority will return to a higher level.

- 15.23 Rules of engagement may be retained at the level of the force commander, so that a request for authorisation must be submitted in each individual case, or for a specific operation. Since obtaining such authorisation may take time, this must be planned in advance so that those who make the decision are already informed of the situation and can make a quick decision when it becomes necessary. For example, a unit may plan an offensive operation to remove an enemy from an area. As part of the planning of the operation, checks must be carried out to verify whether the necessary rules of engagement are available and, if relevant, to request authorisation to use more offensive rules of engagement.
- 15.24 A final alternative is to have rules of engagement which are not implemented, but are approved at political level and ready for use if certain situations arise. These are referred to as dormant rules of engagement. Such rules may be relevant, for example, for operations thought to carry a risk of escalating the conflict, making more robust rules of engagement necessary in the longer term. Such rules can then be prepared pending a decision by a competent authority that they are required.

## Development of rules of engagement

- 15.25 Rules of engagement contain provisions on the conduct of an operation which take into account political, legal and operational considerations and restrictions. Since rules of engagement entail both permissions and restrictions, they influence how operations may be carried out. It is therefore important that a decision is made early in the planning of an operation and the development of the applicable operational plan (OPLAN) as to which rules of engagement are considered critical or appropriate for the conduct of the mission. The development of rules of engagement should be done by an interdisciplinary group to ensure that the greatest possible spectrum of considerations is taken into account. Since different levels will have different needs and interests they wish to safeguard, the continuous exchange of information between the different levels is important. This includes the political level, which gives final approval to rules of engagement. In Norway, the Ministry of Defence authorises rules of engagement, while in the NATO this function is performed by the North Atlantic Council (NAC).

- 15.26 Once rules of engagement are authorised at political level, they are implemented in the operational organisation and made known to relevant units at the individual level. Any changes to rules of engagement are implemented in the same way. When clarifications of individual rules of engagement are required, these take the form of an ROE Amplification (ROEAMPL) regarding the relevant rule. A possible example of amplification is specifying whether a rule of engagement authorising riot control permits the use of tear gas. During the course of an operation, various changes may be made to rules of engagement. An ROE Summary (ROESUM) providing an overview of implemented rules of engagement will be useful in such cases.
- 15.27 To ensure that all personnel conducting activities under rules of engagement are aware of their provisions, local commanders must provide training in their use. This may include discussions of scenarios or case studies, as well as war gaming.
- 15.28 It is important that rules of engagement give military commanders the flexibility they require to accomplish missions. However, such rules do not extend beyond the mandate for the operation or the political and legal frameworks for an operation. While rules of engagement may be amended during the course of an operation, in a multinational operation this may take some time due to the need to secure political agreement among the participating states.

## **Soldiers' card**

- 15.29 Most soldiers will not be required to consider a full set of rules of engagement. Not only is the information extensive and complex, but if too widely distributed it could increase the risk that different persons may interpret rules of engagement differently. Instead, a soldiers' card is prepared which communicates the most relevant rules of engagement in ordinary language and explains the political guidelines governing their application.